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# Supreme Court of the United States

October Term, 1997

REBEL OIL COMPANY., a Nevada corporation, and
AUTO FLITE OIL COMPANY, INC., a Nevada corporation,

*Petitioners,*

*-v-*

ATLANTIC RICHFIELD COMPANY,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## Question Presented for Review

When a defendant in a predatory-pricing case claims its costs are "indeterminate," should a plaintiff be precluded, as a matter of law, from showing below-cost pricing by relying on economic methodology sanctioned by Areeda and Hovenkamp, and on cost data from the defendant's own accounting records, from arms-length transactions between the defendant and third parties, and from geographically-proximate market prices used by the defendant to measure its product acquisition costs?

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## Citation of Opinions and Orders

The order of the United States District Court for the District of Nevada first granting summary judgment to Atlantic Richfield Company ("ARCO") is reported at 808 F. Supp. 1464 (1992). The order of the Court of Appeals for the Ninth Circuit affirming in part and reversing in part the judgment of the district court is reported at 51 F.3d 1421 ("*Rebel I*") (App. C), and denial of ARCO's petition for certiorari was reported at 516 U.S. 987 (1995). On remand, the district court's second order granting summary judgment to ARCO is reported at 957 F. Supp. 1184 (1997). The court of appeals' affirmance of the district court's second order granting summary judgment is reported at 146 F.3d 1088 ("*Rebel II*") (App. A). The district court's order of Feb. 28, 1997 denying ARCO's motion in limine to exclude plaintiff's experts (App.B) is not reported.

## Basis for Jurisdiction in this Court

The order of the court of appeals affirming the district court's second order granting summary judgment was filed on June 23, 1998 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Statutory Provisions Involved

This case involves Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a).

## Statement Of The Case

Rebel Oil has alleged *inter alia* that ARCO engaged in predatory, primary-line price discrimination under the Robinson-Patman Act, 15 U.S.C. § 13(a), by selling gasoline in the Las Vegas gasoline markets below its cost during the 1986-89 period, and then – once competition in Las Vegas had been decimated – recouping its losses by leading a supracompetitive-pricing oligopoly in that city during 1990-91. The court of appeals rejected the three objective measures Rebel used to show ARCO's below-cost pricing.

The court of appeals has created an insuperable "Catch-22" not only for Rebel, but for plaintiffs generally who seek to pursue predatory pricing claims against sophisticated multi-product producers. (The Ninth Circuit's decision also makes compliance with the antitrust laws a chancy undertaking for aggressive pricers.) The court disregarded the fact that, on the one hand, ARCO refused throughout discovery to produce requested data as to its costs for gasoline; ARCO insisted that – because of the complexities of breaking out costs for a single product in a multi-product stream – these costs are "indeterminate" *as a matter of law*. On the other hand, when Rebel's expert came forward with measures of ARCO's marginal cost based on fundamental principles of economics – supported by empirical market data accepted by ARCO for accounting purposes – the Ninth Circuit rejected these measures *as a matter of law*. Even though Rebel had relied on the very measure of cost set forth in Areeda and Hovenkamp's treatise based on *Rebel I*, the court held that Rebel failed to demonstrate an "appropriate measure of cost" under *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993). *See Rebel Oil Co. v. Atlantic*

*Richfield Company*, 146 F.3d 1088, 1095-1096 (1998) ("*Rebel II*").

The underlying facts can be briefly summarized. All of ARCO's gasoline sold in Las Vegas is shipped by pipeline from Los Angeles. Notwithstanding the transportation costs incurred by ARCO to ship the gasoline to Las Vegas, and the fact that the L.A. market is one of the most competitive in the world, ARCO's prices in Las Vegas uniformly *undercut* its Los Angeles prices (by as much as 24 cents per gallon) during the 1986-89 period of predation.

During that period, more than thirty-seven firms, including five major oil companies, fled the Las Vegas market, enabling ARCO to achieve a market share that was unprecedented in the U.S. petroleum industry. During the ensuing period of recoupment (1990-91), ARCO's Las Vegas prices consistently exceeded those in Los Angeles by as much as 19 cents per gallon.

Rebel propounded the expert report of Professor Keith Leffler, which was found by the trial court – in its denying ARCO's motion to dismiss Leffler's testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) – to embody an "economically-valid" methodology that was "relevant" to the measure of ARCO's marginal cost. *See* App. A at 15. Professor Leffler found that the marginal costs of ARCO gasoline were significantly higher than ARCO's selling prices over an extended period of three years (1986-89). The Ninth Circuit rejected each of Professor Leffler's measures of ARCO's costs, however.

This petition addresses Rebel's three objective measures of ARCO's marginal cost of gasoline. The first is the market value of crude oil that ARCO traded to Tosco

OilCompany to obtain incremental supplies of gasoline (when ARCO could no longer meet its supply needs from its own refineries). The cost to ARCO of this incremental gasoline was reflected in invoices from Tosco that were paid by ARCO, and also by evidence confirming that ARCO valued its crude oil at market price. Even though the Ninth Circuit ruled that the Tosco Agreement was a purchase, not a "swap" immune from antitrust scrutiny (as ARCO contended it was), the court rejected ARCO's invoices from Tosco as a measure of ARCO's marginal cost. The court reasoned that because these invoices reflected the market price of crude oil, they were merely a measure of "opportunity costs" which, the court proclaimed, can never be used "as a matter of law" in analyzing below-cost selling. *Rebel II*, 146 F.3d at 1095.

As an alternate measure of ARCO's marginal cost of gasoline, Professor Leffler used the wholesale prices in the competitive Los Angeles gasoline market, as measured by thousands of daily "rack prices" at the L.A. terminals. In support of this measure, which closely matched the gasoline prices under the Tosco Agreement, Professor Leffler relied on the fact that all gasoline sold in Las Vegas is shipped via pipeline from Los Angeles. He then turned to the textbook economic principle that in a competitive marketplace such as Los Angeles, the price of a commodity converges to its marginal cost. Without analysis, the court of appeals rejected this measure of ARCO's cost out of hand – even though the district court had expressly held it to be a "valid economic method." *See id.* at 1096; App. A. at 15.

ARCO's below-cost selling in Las Vegas was corroborated, moreover, by yet a third measure of its costs: the Profit/Loss Statements for the retail outlets of its

wholly-owned subsidiary, Prestige Stations, Inc. (or "PSI"). These profit/loss statements, based on empirical market data, showed that during the 1986-89 period of predation ARCO suffered massive operating losses at its PSI retail outlets in Las Vegas.

While under ordinary circumstances the price that a parent company charges to a wholly-owned subsidiary can be disregarded as an internal "transfer" price (with significance only to the company's internal accounting), that was not the case here – because ARCO charged the very *same* price to its independent ARCO dealers in Las Vegas. Thus, the fact that ARCO's company-operated PSI retail outlets suffered such huge operating losses provides probative, corroborating evidence that ARCO was, in fact, selling gasoline at predatory below-cost prices in Las Vegas during the period of predation.

**Argument In Support Of Petition**

Regardless of whether the Court decides to postpone deciding what constitutes "an appropriate measure of cost," the Court should decide now whether a plaintiff – faced with the defendant's claims that its costs are "indeterminate" – should be foreclosed from relying on economic principles, and objective market and defendant-specific accounting data, in attempting to prove its predatory-pricing case.

Because the Ninth Circuit has decisively rejected a plaintiff's reliance on objective measures of cost that are "methodologically valid" as a matter of economics (and endorsed by Areeda and Hovenkamp), *Rebel II* effectively immunizes multi-product producers from predatory pricing claims. Here, ARCO claimed that its costs of gasoline are

"indeterminate" as a matter of law" purportedly because of the complexities involved in assigning input costs to its varied petroleum products. By blessing this defense, the Ninth Circuit effectively makes it an absolute bar to price discrimination liability for other such producers.

Moreover, by deciding that opportunity costs may not be used as a matter of law, the Ninth Circuit's holding magnifies the confusion already extant as to the measure of cost that may be used in predatory pricing actions. Indeed, *Rebel II* creates a clear split between federal circuit courts as to whether "opportunity costs" can be used as such a measure of below-cost pricing. *Compare Rebel II*, 146 F.3d at 1095 (rejecting use of opportunity costs), and *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1500 n.31 and 1501 (11th Cir. 1988), *reh'g denied*, 865 F.2d 1274 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2110 (1989) (noting that, for purposes of predatory pricing analysis, ACongress intended all costs to be part of the standard" used to show below-cost pricing, and that this would include costs Aunder the alternative cost doctrine (also known as the opportunity cost doctrine)"); *see also U.S. Law Week*, Vol. 67, No. 4, at 2062 (August 4, 1998) (App. E) (noting, in *Circuit Split Roundup*, that "[t]he Ninth Circuit has noted the continuing division over the appropriate measure of costs in predatory pricing cases" (citing *Rebel II*)). The confusion among federal courts as to the appropriate measure of costs generally, and the split between federal circuits on the issue of opportunity costs specifically, frustrates both enforcement of, and compliance with, the Sherman and Robinson-Patman Acts' predatory pricing provisions.

## I. WHERE A PREDATOR'S COSTS ARE "INDETERMINATE," OBJECTIVE MEASURES OF ITS COSTS MUST NOT BE FORECLOSED

The Court has declined to define the "appropriate-measure" of cost to be used in predatory pricing actions. *See Brooke Group*, 509 U.S. at 222 n.1 ("we again decline to resolve the conflict among the lower courts over the appropriate measure of cost"); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.8 (1986) ("[w]e need not resolve this debate here"). As a result, federal courts and the parties before them have had no clear direction as to what below-cost pricing consists of, or how it can be proven or defended against. *See Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, 63 F.3d 1540, 1549 n.5 (10th Cir. 1995) ("[u]nfortunately for litigants, neither the Supreme Court nor we have taken a position on which of various cost measures is the definitive one . . ."), *cert denied*, 516 U.S. 1044 (1996). One thing must be clear, however: a defendant should not be able to evade predatory pricing liability solely by insisting that its costs are "indeterminate."

### A. ARCO's Arms-Length Gasoline Exchange Agreement With Tosco Provides Reliable, Objective Evidence Of ARCO's Cost Of Gasoline

With *Rebel II* the Ninth Circuit has broken ranks with the foremost treatise in the field, Philip E. Areeda and Herbert Hovenkamp's *Antitrust Law* (rev. ed. 1996). In Volume III, ¶740 of that seminal treatise, Professors Areeda andHovenkamp offered their guidance on the issue of marginal cost in the very context of this case, and showed

why the Tosco Agreement can and should serve as the basis for a measure of ARCO's marginal cost. Specifically addressing the Ninth Circuit's decision in *Rebel I*, Areeda and Hovenkamp observed:

> In the Ninth Circuit's *Rebel Oil* case the plaintiff alleged that the defendant was unable to supply gasoline at the predatory price from its own refineries, so it contracted to purchase more from an independent supplier, and paid more than it charged upon resale.[1] If so, the resulting price was clearly below marginal cost. Further, as the court noted, that would be true of *all* sales made at that price, not only for the sales of the gasoline bought at a high price. "Marginal" cost does not look at the average cost, but the incremental cost of the last unit produced, which in this case was the higher cost units procured from the independent supplier.[2]
>
> Suppose, for example, that a firm refined 1,000 gallons per day of its own gasoline, which has variable costs of $1 and which normally sells at a price of $1.10. Because this volume exhausts the firm's refining capacity, it then supports predation by purchasing additional gasoline at $1.06, and

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[1] This footnote states as follows: "*Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995)."

[2] This footnote states as follows: "See 51 F.3d at 1431 & n.1."

> selling all its gasoline at a price of $1.03. In this case we have evidence of prices below marginal cost, even though they might be above average variable cost.[3] The *incremental* gasoline costs $1.06, which is greater than the price of $1.03. Under the marginal cost test it does not matter that the firm's self-refined gasoline continues to have average variable costs less than the price; what matters is that the firm has increased output and cut price into a range in which incremental costs are greater than incremental revenue.[4]

*Antitrust Law*, Vol. III at 378-79 (italics in original; undermine emphasis added) (App D). The Ninth Circuit dismissed this analysis in a footnote: "Rebel's selection from Antitrust Law states only what Rebel alleged: that the Tosco Agreement represented a 'purchase' for which ARCO 'paid,' and that 'if so,' the agreement would serve as a measure of marginal cost." *See Rebel II*, 146 F.3d at 1094 n.1 (App. A).

On its face, the above-quoted analysis from Antitrust Law goes far beyond merely restating what Rebel Oil had alleged in *Rebel I*, and in fact makes clear shows that Areeda and Hovenkamp *endorse* Rebel's analysis. Moreover, in *Rebel II* the court of appeals confirmed that the Tosco Agreement is not a swap immune from antitrust scrutiny (as ARCO had

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[3] This footnote states as follows: "If the volume of self-refined gas costing $1 is large, while the volume of purchased gasoline costing $1.06 is small, then the $1.03 price might still be above average variable cost."

[4] This footnote states as follows: "The hypothetical case is also an illustration of marginal cost higher than average variable cost under conditions where output is too large in relation to capacity."

strenuously contended it was), but rather a *purchase* – bringing it squarely within the Areeda and Hovenkamp analysis. *See* 146 F.3d at 1094.

In measuring what ARCO paid Tosco for the incremental gasoline, Professor Leffler needed to look no further than the invoices ARCO paid for it, which set forth a price based on the market value of the Alaskan North Slope crude oil that ARCO in turn sold to Tosco. The price in the invoices reflected Adam Smith's economic maxim that the "price of anything is equal to its exchangeable value." This measure also reflected the principle that in a competitive market (such as crude oil), price converges to marginal cost; the market value of the crude oil ARCO used to pay for the Tosco gasoline accurately represented ARCO's marginal cost.

The Ninth Circuit rejected this analysis on two grounds, neither of which is sustainable. First, the court reasoned that "the market price for crude oil is not what ARCO spent in obtaining the crude oil." *Rebel II*, 146 F.3d at 1095. But as Leffler himself explained (and the court quoted but misunderstood, *see id.*), "the marginal cost to ARCO of obtaining the additional *gasoline* from Tosco is given by the value of that crude oil they gave up." (Emphasis added.) Put differently, ARCO's cost of obtaining that additional *gasoline* does not vary merely because it pays for it with crude oil instead of money. In rejecting Professor Leffler's analysis as a matter of law, the Ninth Circuit effectively rejected the use of true economic cost as an "appropriate measure" for purposes of predatory pricing analysis.

Second, the court concluded that Leffler's measure of cost based on the Tosco purchase – the market value of thecrude oil that ARCO paid for the gasoline – "represents

only what ARCO would have received had ARCO sold the crude oil in the market rather than trading it to Tosco for gasoline." *Id.* The court reasoned that this measure "is thus really the opportunity cost to ARCO," the use of which the Ninth Circuit ruled to be "improper as a matter of law." *Id.* (citing *In re IBM Peripheral EDP Devices Antitrust Litigation*, 459 F. Supp. 626, 631 (N.D. Cal. 1978), and *Continental Airlines, Inc. v. American Airlines, Inc.*, 824 F. Supp. 689, 701 (S.D. Tex. 1993)). Here the Ninth Circuit misapplied the concept of "opportunity cost" both as a matter of economics and as a matter of law, thus deepening the confusion – and the split – among the federal courts on this issue.

As a matter of economics, the court's assumption that Rebel's measure here was an opportunity cost is inconsistent with the court's acknowledgement that the Tosco exchange was a purchase, not a "swap." *See* 146 F.3d at 1094. It also errs in overlooking the fact that ARCO *did not give up anything* – did not forego any "opportunity" – in purchasing the gasoline from Tosco and paying for it with ARCO crude oil. ARCO paid for the gasoline with crude oil valued at market price (as the price formula expressly states); the court's assumption that it did not would necessarily imply the absurd result that ARCO chose not to receive as much gasoline from Tosco as it could have.

As a matter of law, the Ninth Circuit's misplaced reliance on *IBM* and *Continental Airlines* to foreclose Rebel's use of the Tosco-based measure of cost merits reversal in and of itself. *See Rebel II*, 146 F.3d at 1095. Even assuming *arguendo* that the crude oil ARCO paid to Tosco was an opportunity cost, neither of the cited decisions supports the Ninth Circuit's holding, largely because the opportunity costs rejected in those decisions were hypothetical, speculative

measures that bear no relation to the concrete measure reflected in ARCO's arms-length agreement with Tosco. In *Continental Airlines*, the court rejected Continental's argument that the revenue American Airlines gave up by discounting certain tickets was an "opportunity cost" that had to be included in American's variable costs; the court reasoned that opportunity cost is calclulated "by anticipating the cost of implementing the choice not chosen." *Id.*, 824 F. Supp. at 701. In *IBM*, the court declined to consider opportunity cost because, *inter alia*, in that case such an analysis would restrict a manufacturer's business decision to that which was "predicted to produce the greatest monetary rewards." *Id.*, 459 F. Supp. at 631-32 (observing that "the notion that a failure to profit maximize could violate the Sherman Act was soundly rejected by Professors Areeda and Turner").

The Ninth Circuit's erroneous reliance on these narrowly-reasoned district court decisions to foreclose Rebel's proof here – and, indeed, to preclude any measure of cost purportedly involving opportunity costs – sets an alarming precedent. Where, as here, a predatory pricing scheme is alleged to have been undertaken by a highly-sophisticated, litigation-savvy, multi-product producer able to shield its marginal cost of production from discovery, a plaintiff should not be foreclosed as a matter of law from relying on *any* economically-valid proxy to make its case – as the Eleventh Circuit properly recognized in *McGahee*, 858 F.2d at 1500 n.31 ("Congress intended all costs to be part of the standard" used to show below-cost pricing, and that this would include costs "under the alternative cost doctrine (also known as the opportunity cost doctrine)").

### B. Objective Pricing Data From Geographically-Proximate Markets Provides Additional Reliable Evidence Of An Alleged Predator's Costs

As an alternative measure of cost, Professor Leffler reasoned that, because virtually all Las Vegas gasoline comes from Los Angeles via the Cal-Nev pipeline, "the costs of gasoline at the Los Angeles rack, plus transportation costs, tells the costs an efficient seller . . . would face in Las Vegas." In denying ARCO's motion to exclude Leffler's testimony, the district court specifically held that his L.A.-rack-based measure of marginal cost was a "valid economic method." *See* App. B at 15. The district court reasoned that:

> ARCO has made no showing that price comparisons between two geographic markets are improper methods of economic analysis. Leffler has offered testimony that the Los Angeles market is a very competitive market. ARCO has offered testimony that the costs of entry such as the transportation costs over the Cal-Nev pipeline are low. Therefore, Leffler's use of the Los Angeles price plus a transportation differential is a valid methodology sufficient to be admitted at trial.

*See id.* (App. B).

Leffler's use of the L.A. rack as a basis for deriving ARCO's marginal cost is squarely in accord with textbook economic theory equating marginal *cost* with market *price* in a competitive market. In addition – far from representing a

measure of cost unrelated to ARCO's cost of gasoline – the L.A. rack price is the very price that ARCO's gasoline exchange partners agree to pay ARCO in the event of an exchange imbalance. Thus, if ARCO is "owed" 100 gallons of gasoline by an exchange partner (such as Mobil Oil), ARCO's exchange agreements require that partner to make payments computed by multiplying the L.A. rack price times the amount of gasoline owed. Thus ARCO itself, in its dealings with other oil companies, uses the L.A. rack as the appropriate proxy for its *cost* of gasoline. Professor Leffler's analysis did the same.

Moreover, Professor Leffler's rack-based measure of ARCO's marginal cost yielded a result that correlated closely with the showing of ARCO's marginal cost based on the Tosco exchange agreement. The data for these two measures of ARCO's marginal cost correlated not merely in the short run, but consistently over a period of nearly three years.

Nonetheless, the court of appeals also rejected the L.A. rack-based formulation of marginal cost as a matter of law. The court did not provide any analysis for its conclusion, other than its reiteration of ARCO's assertion that "'Rebel has made no showing of ARCO's actual costs of producing gasoline.'" *See* 146 F.3d at 1096. The Ninth Circuit thus enabled ARCO – based on its professed inability to produce *any* data revealing its "indeterminate" cost of gasoline – to escape a jury's scrutiny of its consistently-predatory pricing conduct in Las Vegas over a period of three years.

### C. An Alleged Predator's Accounting Data Provides Reliable Evidence Of Cost

A third measure of ARCO's below-cost selling was provided by Rebel expert Harry Holcombe, a certified public accountant and petroleum marketing consultant. In his report, Mr. Holcombe set forth the results of the Profit/Loss Statements for ARCO's company-owned, company-operated PSI retail outlets in Las Vegas, which revealed that ARCO sustained massive operating losses on retail gasoline sales during the relevant time period. The court of appeals rejected this testimony, however, on the basis that segmented reports for an integrated company cannot provide probative, material evidence as a matter of law. *See Rebel II*, 146 F.3d at 1096.

This objection to the use of the PSI Profit/Loss statements was, however, anticipated and rebutted by Rebel's expert, who testified that these statements were intended by ARCO management to provide an objective measurement of PSI operating results. He testified that the transfer prices of gasoline set by the parent ARCO were not arbitrary cost figures, but rather actual costs at which ARCO sold gasoline to its *independent* ARCO dealers in Las Vegas (such as Herbst Oil Company). This assured that the PSI Profit/Loss Statements provided reliable and verifiable market operating results, which in turn provided important, independent corroborating evidence of ARCO's below-cost pricing in Las Vegas. In sum, just as the Ninth Circuit erred in rejecting Professor Leffler's showing of below-cost pricing using two separate measures of cost, the court similarly erred in dismissing the PSI data corroborating Professor Leffler's methods and conclusions.

## II. THE *REBEL II* DECISION UNDERMINES ENFORCEMENT OF, AND COMPLIANCE WITH, THE ANTITRUST LAWS

To ensure compliance with the antitrust laws and to guard against antitrust liability, an aggressive price-setter requires assurances that its prices are not below an "appropriate measure of cost." In the absence of clear guidance from the Court as to what an appropriate measure may be for purposes of price discrimination, *Rebel II's* disallowance of objective measures of cost as a yardstick will undermine compliance with the antitrust laws. By precluding the application of economic theory supported by empirical market and accounting evidence, *Rebel II* does away with critical tools that a vigilant company should be able to rely on in its efforts to ensure compliance. Companies acting in good faith not only will be unable to conform their pricing behavior to standards that are becoming increasingly amorphous, but also will be unable to ensure that aggressive, competitive pricing will not subject them to costly and burdensome predatory-pricing litigation.

Conversely, the Court has observed that, while predatory pricing may be used "infrequently, there is ample evidence . . . [it] does occur" in violation of the antitrust laws. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 121-22 (1986). In the wake of *Rebel II*, how are enforcement officials to discern pricing activity that is procompetitive rather than pernicious, without recourse to an objective standard with which to measure below-cost pricing? Unless reversed, the ability of the Justice Department and private plaintiffs to enforce and ensure compliance with the Sherman and Robinson-Patman Acts' predatory pricing provisions will be seriously undermined, for at least three reasons.

First, any manufacturer of multiple products will be able to shield itself from predatory pricing enforcement merely by establishing an accounting system (or lack of same) that renders the costs for each product "indeterminate." Under the regime established by *Rebel II*, a vertically-integrated predator engaged in the production of multiple products and byproducts can effectively shield itself from antitrust pricing liability simply by making sure that its costs for any particular product are "indeterminate" for purposes of discovery. With opposing experts from the Justice Department or private plaintiffs stripped of the ability to rely on economic principles to demonstrate an objective measure of cost, enforcement of the Act thus turns on the predator's ability to disguise, muddle or do away with the cost data of its highly-complex internal processes. Enforcement, in short, turns on the predator's sophistication in record-keeping (to put it politely), and on its adroitness and gamesmanship in discovery.

Just as antitrust jurisprudence is founded on antitrust economics, antitrust economics itself is founded on well-established economic theory and principles. Thus, not surprisingly, various courts have followed *Brooke Group* in holding that an expert's testimony that *conflicts with* established economic theory cannot support a jury verdict, *see, e.g.*, *In re Aluminum Phosphide Antitrust Litigation*, 893 F. Supp. 1497, 1502 (D. Kan. 1995) (rejecting expert's analysis, in price-fixing conspiracy action under Sherman Act §1, as "not consistent with accepted economic practice"); *City of Tuscaloosa v. Harcos Chemicals, Inc.*, 877 F. Supp. 1504, 1526 (N.D. Ala. 1995) (ruling expert's opinions inadmissible in antitrust conspiracy action, as they "do not have general acceptance in economics").

Here, conversely, the Ninth Circuit's ruling effectively *forbids* an expert from basing testimony in a predatory pricing case on one of the most well-established economic principles (underlying each of Professor Leffler's measures of cost here): that price in a competitive market is equivalent to marginal cost. The expert is foreclosed from using this bedrock principle even where (as here) independently-derived, objective measures of cost corroborate each other by yielding nearly-identical results, and the predator's pricing is shown to be *substantially* below either measure for years on end.

Second, by foreclosing Leffler's reliance on the market value of crude oil as ARCO's cost for the Tosco gasoline, *Rebel II* establishes a regime divorced from basic economic principles that will produce false negatives and false positives when applied to pricing activity alleged to be predatory. To illustrate the court's error as matter of economics, described below is a hypothetical situation in which gold bullion with a market value of $325/oz. is paid (instead of crude oil) for gasoline. Regardless of whether the bullion is obtained by its owner for less, or received as a gift for free, it is apparent that the owner's cost of obtaining the gasoline must be measured according to the market value of the bullion paid.

Posit three scenarios in which the $325/oz. bullion used to purchase gasoline is (a) purchased for $425/oz; (b) produced at $100/oz.; and (c) purchased for $250/oz. While Rebel (in line with prevailing economic principles) would value the cost of gasoline bought with such bullion at the latter's market value of $325/oz., the Ninth Circuit contends that the cost of obtaining the bullion should govern. *See* 146 F.3d at 1094-96. Yet such an approach would play havoc

with the antitrust laws. Under scenario (b), if the cost of production ($100/oz.) were used to value the purchaser's cost of gasoline, integrated companies would have broad license to resell such gasoline at predatory prices immune from antitrust scrutiny.

By the same token, under scenario (a), in which the bullion was purchased for $100 above its current market value, a seller of gasoline obtained with such bullion could be judged to be pricing predatorily (based on acquisition cost) even if the selling price exceeded both market levels and the market value of bullion ($325/oz.). Finally, under scenario (c), in which the bullion used to purchase gasoline was fortuitously obtained earlier at a depressed price of $250/oz., the gasoline seller would be free to engage in predatory pricing even though the actual cost of gasoline (based on market prices) is higher than selling prices. In sum, predicating a predatory pricing analysis on the vagaries of when and at what price the bartered commodity is purchased will lead to false negatives or false positives that can readily be used by predators to evade antitrust enforcement.

Third, the Ninth Circuit's rejection of the use of opportunity costs as a matter of law will further undermine antitrust enforcement by removing what may be, in a given case, the only objective cost-measurement tool available. The potential scenarios in which the doctrine of opportunity costs may come into play are as varied as they are difficult to foretell. Nor are such scenarios necessarily limited to the predatory pricing context. For example, claims that Microsoft Corporation moved software functions from its operating systems to its application programs may necessarily require an opportunity cost analysis, for lack of any internal cost data

that can be separately broken out in such a factually-intricate context.

In short, as the complexity of such operations increases, so too does any investigation of internal cost data. To ensure that the Department of Justice and private plaintiffs alike are not unfairly deprived of traditional economic tools needed to enforce and ensure compliance with price discrimination laws, the Ninth Circuit's ill-reasoned rejection of the use of the opportunity cost doctrine to measure a predator's costs should be reversed.

## Conclusion

WHEREFORE, Petitioner requests that this Court grant the petition for a writ of certiorari to address and resolve the substantial concerns raised by the Ninth Circuit's *Rebel II* decision.

Respectfully submitted,

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**(Any footnotes trail opinion)**

U.S. 9th Circuit Court of Appeals

No. 97-15449
D.C. No. CV-90-0076-PMP/RLH
OPINION

REBEL OIL COMPANY, INC., a Nevada corporation, and AUTO FLITE OIL COMPANY, INC., a Nevada corporation,
Plaintiffs-Appellants,

v.

ATLANTIC RICHFIELD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted
February 10, 1998--San Francisco, California

Filed June 23, 1998

Before: Dorothy W. Nelson, Robert Boochever, and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Boochever

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COUNSEL

William H. Bode, William H. Bode & Associates, Washington, D.C., for the plaintiffs-appellants.

Donald C. Smaltz, Rancho Palos Verdes, California, for the defendant-appellee.

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OPINION

BOOCHEVER, Circuit Judge:

Rebel Oil Company appeals from the district court's grant of summary judgment in favor of Atlantic Richfield Corporation, after this court remanded Rebel's antitrust action against ARCO. We affirm.

FACTS

The following statement of facts is taken in part from this court's decision in Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir.), cert. denied, 516 U.S. 987 (1995), and from the district court opinion that is the subject of this appeal, Rebel Oil Co. v. Atlantic Richfield Co., 957 F. Supp. 1184 (D. Nev. 1997).

Gasoline sold in the Las Vegas, Nevada area is first produced from crude oil in refineries in Los Angeles, California. Wholesale marketers then pump the gasoline to Las Vegas over a pipeline operated by the Cal-Nev Pipeline Co., which

transports ninety-five percent of Las Vegas' gasoline. Wholesale marketers then sell the gasoline to Las Vegas retail marketers, who then sell the gasoline to consumers.

Rebel Oil Company, Inc. and Auto Flite Oil Company, Inc. (collectively "Rebel") are retail marketers of gasoline in Las Vegas, selling only self-serve, cash-only gasoline. Rebel has 16 retail stations. In addition to its retail sales, Rebel is also a wholesaler who ships gasoline refined in Los Angeles over the Cal-Nev pipeline, to be sold to retail marketers in Las Vegas. Atlantic Richfield Corporation ("ARCO") is both a wholesale and a retail marketer of gasoline in Las Vegas, and also drills and refines crude oil into gasoline. ARCO supplies gasoline to 53 retail stations in Las Vegas under the "ARCO" name, all of which sell only self-serve, cash-only gasoline. A subsidiary of ARCO, Prestige Stations ("PSI"), operates 15 of those 53 stations. The remaining 38 stations operating under the ARCO name are owned and operated by independent dealers.

Rebel and other discount marketers of gasoline saw their business grow in the 1970s, as cost-conscious motorists driving low-mileage vehicles saved money by buying self-serve, cash-only gasoline rather than visiting full-service stations. In 1982, ARCO adopted a nationwide strategy to respond to this change in the gasoline market. The strategy called for the elimination of full-serve and credit-card sales and offered dealers incentives for matching the prices of the discount independent stations. ARCO's strategy increased its sales and market share nationwide.

PROCEDURE

In 1990, Rebel filed an antitrust suit for damages against

ARCO under Section 4 of the Clayton Act. Rebel alleged that between 1985 and 1989, ARCO charged predatory prices in an attempt to take away market shares from its competitors, with the goal of monopolizing the gasoline market in Las Vegas. Rebel claimed that the predatory pricing scheme forced competitors out of the Las Vegas market, and that Rebel lost sales as a result and had to concentrate on the wholesale market. Rebel also claimed that when ARCO's predation ended, ARCO had fifty-four percent of the market for self-serve, cash-only gasoline, and that ARCO then engaged in price gouging, charging prices in Las Vegas that were higher than Los Angeles prices to recoup its losses resulting from the previous low predatory prices.

The district court limited Rebel's discovery solely to the "more discrete" issues of ARCO's market share and the entry barriers in the relevant market, which would determine whether ARCO had sufficient market power to charge prices above competitive levels ("supracompetitive prices"). Rebel Oil Co., Inc. v. Atlantic Richfield Co., 133 F.R.D. 41, 45 (D. Nev. 1990). The court reserved discovery on the issue whether ARCO had engaged in predatory pricing until after Rebel made an adequate showing of market power, because "[p]roving that a defendant has engaged in pricing below cost entails extensive discovery regarding virtually all aspects of a company's business." Id.

In the fall of 1992, both parties filed motions for summary judgment and the district court granted summary judgment for ARCO on all three antitrust claims. Rebel Oil Co. v. Atlantic Richfield Co., 808 F. Supp. 1464 (D. Nev. 1992). The court concluded that ARCO's market share of the retail gasoline market in Las Vegas was insufficient as a matter of law to establish market power; that Rebel failed to show that barriers to entry prevented other retailers from entering the

retail market; and that as a result of the lack of market share and entry barriers, ARCO lacked the power to charge supra-competitive prices to recoup any losses from predatory pricing.

Rebel appealed, and this court affirmed in part and reversed in part in Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir.), cert. denied, 116 S. Ct. 515 (1995) ("Rebel I"). Rebel I affirmed the district court's summary judgment in favor of ARCO on the claims of attempted monopolization, because Rebel had not established the existence of a genuine issue of material fact whether ARCO had the market power required to support an attempted monopolization claim. Id. at 1443.

Rebel I reversed the grant of summary judgment dismissing Rebel's claim that ARCO had practiced "primary line" price discrimination, by "charg[ing] predatory, below-cost prices in one [geographical] market in an attempt to eliminate competitors there, and charg[ing] supracompetitive prices in another market." Id. at 1445. Because a lesser showing of market power was required for a claim of price discrimination than for a claim of attempted monopolization, id. at 1447, the court concluded that Rebel had produced sufficient evidence to create a disputed question of material fact whether ARCO had enough market power to enforce supracompetitive pricing. Id. at 1448. Although Rebel had not shown that ARCO had sufficient market power for an attempted monopolization claim, for price discrimination Rebel needed only to prove that ARCO possessed a level of market power to threaten oligopolization. An oligopoly is "[a] market condition in which sellers are so few that the actions of any one of them will materially affect price and hence have a measurable impact upon competitors." American Heritage Dictionary of the English Language 916 (1970).

> The economic forces at work in an oligopoly are very different than in a monopoly. A predator is able to establish and maintain supracompetitive prices in an oligopoly by making it too painful for its existing competitors to challenge its prices, and thus, `disciplining' them. . . . Read in the most favorable light, Rebel's evidence tends to indicate that no new competition can enter the market to challenge ARCO, and that the existing competition, while it may be able to challenge ARCO, lacks the will to do so.

Rebel I, 51 F.3d at 1448. The court remanded to the district court for further proceedings on the price discrimination claim. Id. at 1448.

On remand, the parties conducted discovery on the issue of predatory pricing. ARCO then moved for summary judgment. ARCO simultaneously filed a motion in limine to exclude Rebel's expert testimony under Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), which the district court granted in part. [ER p. 281]

The district court also granted ARCO's motion for summary judgment. Rebel Oil Co. v. Atlantic Richfield Co., 957 F. Supp. 1184, 1196-1204 (D. Nev. 1997) ("Rebel II"). The court rejected Rebel's contention that, under the law of the case doctrine, our decision in Rebel I compelled a finding that Rebel had offered sufficient evidence to preclude summary judgment on its price discrimination claim. Id. at 1194-95.

The court acknowledged that Rebel I determined that material questions of fact existed regarding both ARCO's ability to recoup any losses from predatory pricing and Rebel's dam-

ages. The court concluded, however, that none of Rebel's measures of ARCO's costs was legally adequate to create an issue of material fact regarding whether ARCO priced its gasoline below its costs. Id. at 1200-03. The court also determined that Rebel had failed to present clear and convincing evidence of ARCO's predatory intent. Id. at 1204.

ANALYSIS

This court reviews a grant of summary judgment de novo, evaluating the evidence in the light most favorable to the nonmoving party. Rebel I, 51 F.3d at 1432. Summary judgment is appropriate only when the pleadings, affidavits, and other materials in evidence present no genuine issue of material fact. Id.

[1] Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, prohibits price discrimination:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

15 U.S.C. § 13(a). The statute prohibits "primary-line" price discrimination, when the seller charges predatory, below-cost prices in one geographical market to eliminate competitors

there, but charges supracompetitive prices in another market. Rebel I, 51 F.3d at 1445. Rebel alleges primary-line price discrimination, contending that between 1985 and 1989, ARCO charged below-cost prices in the Las Vegas market to eliminate competition there, while charging higher prices in the Los Angeles market.

[2] To prove primary-line price discrimination, Rebel must prove two things: "that the prices complained of are below an appropriate measure of its rival's costs . . . .[and] that the competitor had a reasonable prospect . . . of recouping its investment in below-cost prices." Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24 (1993); USA Petroleum Co. v. Atlantic Richfield Co., 13 F.3d 1276, 1277 (9th Cir. 1994); Rebel I, 51 F.3d at 1445.

I. Below-Cost Pricing

Rebel presented expert testimony of below-cost pricing, using three different measures of ARCO's cost in Las Vegas: an exchange agreement between ARCO and Tosco Corporation; the Los Angeles "rack price" for gasoline, adjusted for transportation costs; and profit-and-loss statements from Prestige Stations, Inc. ("PSI"), a wholly-owned subsidiary of ARCO. The parties' central dispute on appeal is whether Rebel's evidence established a question of fact whether ARCO priced its Las Vegas gasoline below its costs.

> [O]nly below-cost prices should suffice [for recovery for price discrimination], and we have rejected .. . the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws. . . . As a general rule, the exclusionary effect of prices above a relevant measure of

> cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.

Brooke Group, 509 U.S. at 223; see USA Petroleum, 13 F.3d at 1285 ("above cost below-market level pricing even when coupled with a structural showing such as recoupment, cannot constitute predatory pricing.").

Rebel and ARCO agree that prices are not predatory unless they are below a "relevant measure of cost," but they disagree on whether, as a matter of law, Rebel presented a relevant measure of cost.

[3] Neither the Supreme Court nor this circuit has concluded what would be the appropriate measure of cost in a predatory pricing case. See Brooke Group, 509 U.S. at 222 n.1 ("Because the parties in this case agree that the relevant measure of cost is average variable cost, however, we again decline to resolve the conflict among the lower courts over the appropriate measure of cost."); see Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publications, Inc., 63 F.3d 1540, 1549 n.5 (10th Cir. 1995) ("Unfortunately for litigants, neither the Supreme Court nor we have taken a position on which of various cost measures is the definitive one, although we have spoken of marginal and average variable costs as being relevant."), cert. denied, 116 S. Ct. 702 (1996). It is generally agreed that "the relation between the cost of producing a product and the price charged for it is the criterion for determining whether the price is predatory," Transamerica Computer Co., Inc. v. International Bus. Machs. Corp., 698 F.2d 1377, 1384 (9th Cir.), cert. denied, 464 U.S. 955 (1983).

> Economists, however, measure a firm's costs in a number of ways . . . . Costs are divided into fixed costs (those that do not vary with changes in output) and variable costs (which do so vary). Total cost is the sum of fixed and variable costs. Marginal cost is the increment to total cost that results from producing an additional unit of output. Average cost, or average total cost, is obtained by dividing total cost by output. Likewise, average variable cost is the sum of all variable costs divided by output. Average cost is thus higher than average variable cost for all output levels.

Id. at 1384-85; see Vollrath Co. v. Sammi Corp., 9 F.3d 1455, 1461 (9th Cir. 1993) (plaintiff used average variable cost to argue that prices were predatory), cert. denied, 511 U.S. 1142 (1994); 3 P. Areeda & H. Hovenkamp, Antitrust Law §§ 739-40 (1996) ("marginal-cost pricing is the economically sound division between acceptable competitive behavior and unlawful, `below-cost' predation," but because marginal costs are usually difficult to measure, average variable cost may be a substitute test).

[4] We must determine whether Rebel presented evidence of any of these cost measures that creates a question of material fact on its predatory pricing claim.

A. Law of the Case

Rebel's first argument is that this panel does not even need to decide the cost issue, because it was decided by the panel in Rebel I, and the law of the case governs all further proceedings. Rebel I described expert testimony offered by Rebel: "The expert concluded that ARCO's retail prices in Las

Vegas were consistently below the wholesale prices of all other wholesale suppliers in Las Vegas, and at times were 10 cents or more per gallon below ARCO's marginal cost." Rebel I, 51 F.3d at 1431. Rebel points to footnote 1 of Rebel I, which immediately follows the foregoing quotation, and states:

> Marginal cost is the cost that a firm incurs in the production of one additional unit of output. Herbert Hovenkamp, Economics and Federal Antitrust Law 10 (1985). Rebel measured ARCO's marginal cost based upon an agreement that ARCO signed with Tosco Corp. to purchase incremental supplies of gasoline. Rebel claims that ARCO bought the additional supplies of gasoline from Tosco because it was expanding output but was unable to obtain the additional output from its own refineries. The cost of this "last barrel" of gasoline represents ARCO's marginal cost for gasoline.

Id. at 1431 n.1 (emphasis added). Rebel claims that this footnote and the highlighted sentence conclusively establish that the Tosco agreement presents a material issue of fact regarding below-cost pricing. Rebel also points to the following statement in Rebel I as establishing that another potential measure of marginal cost (the "rack price") presented a material question of fact:

> Rebel's claim alleged primary-line discrimination. As proof, Rebel's expert relied on pricing data showing that for four years, between 1985 and 1989, ARCO charged predatory prices in Las Vegas that, when adjusted for transportation costs, were 6 to 14 cents below those charged in Los Angeles.

Id. at 1445.

[5] Under the doctrine of "law of the case,"

> a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case. The doctrine is not a limitation of a tribunal's power, but rather a guide to discretion. A court may have discretion to depart from the law of the case where . . . the evidence on remand is substantially different . . . . Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion.

United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (citations and quotations omitted). "For the doctrine to apply, the issue in question must have been decided explicitly or by necessary implication in [the] previous disposition. A significant corollary to the doctrine is that dicta have no preclusive effect." Milgard Tempering, Inc. v. Selas Corp., 902 F.2d 703, 715 (9th Cir. 1990) (citations and quotations omitted).

[6] We conclude that the two sections of Rebel I cited as establishing the law of the case were not explicit decisions on below-cost pricing, and therefore do not constitute a basis for the application of the law of the case doctrine. First, as the district court noted in Rebel II, "[b]elow cost pricing was not an issue before the Ninth Circuit Court of Appeals in Rebel I." Rebel II, 957 F. Supp. at 1196 n.7. The district court had bifurcated discovery, and "[t]here was no discovery on predatory pricing, intent and collusion." Rebel I, 51 F.3d at 1432. Rebel I reviewed a district court decision regarding market power. That decision did not evaluate Rebel's proposed mea-

sures of ARCO's costs, which related not to market power but to whether ARCO's prices were predatory. Second, as dis cussed below, the issue of the appropriate measure of cost is a thorny one, and the two brief references in Rebel I to the Tosco agreement and to "rack price" in Los Angeles hardly "decided explicitly" that either measure was sufficient to withstand ARCO's motion for summary judgment. Both state ments are better read as descriptions rather than dispositions of Rebel's claims. "As the issue of below cost pricing was not before the court in Rebel I, any dicta addressing cost measure ments is not law of the case or binding upon this Court." Rebel II, 957 F. Supp. at 1201.1

B. The Tosco Agreement

As evidence to show that "the prices complained of [were] below an appropriate measure of [ARCO's] costs," Brooke Group, 509 U.S. at 210, Rebel presented a 1986"Exchange Agreement" between ARCO and Tosco Corporation.[SER pp. 555-84] Because "ARCO is willing to exchange ANS [Alaska North Slope Crude Oil] for gasoline; and . . . Tosco is willing to exchange gasoline for ANS," the parties entered into a "buy/sell exchange of ANS for gasoline, " [SER p. 555], providing that ARCO would deliver ANS to Tosco, and Tosco would deliver gasoline to ARCO. The quantities to be exchanged were established by a formula set forth in the agreement. The agreement also provided for cash payments by ARCO to Tosco and by Tosco to ARCO when crude oil or gasoline was delivered, and "the dollar amounts paid by each party will equal those paid by the other."[SER p. 567] The cash payments were tied to the market price of ANS. [SER pp. 563, 584]

[7] Rebel argues there is at least a question of material fact whether the agreement is not an exchange but an agreement

to purchase, and thus is a direct measure of ARCO's marginal cost of producing an additional unit of gasoline. This circuit has concluded that a swap of like products is not a "sale" for the purposes of the Robinson-Patman Act. Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1191 (9th Cir. 1984), cert. denied, 469 U.S. 1213 (1985); see American Oil Co. v. McMullin, 508 F.2d 1345, 1353 (10th Cir. 1975) (where oil company supplies petroleum products from its refinery in Salt Lake City to other oil companies, in return for petroleum products from the other companies' refineries in other areas, "[t]he record does not show that these transactions are actually sales."). Because crude oil and gasoline, although related products, are not "fungible," the Tosco Agreement does not document an "exchange of the same product" or "like types of gasoline." Airweld, 742 F.2d at 1192. The agreement is therefore not a "swap," and we must examine ARCO's marginal cost.

ARCO submitted a declaration stating:

> The Exchange Agreement provided for cash payments by Tosco to ARCO, when crude was delivered, and by ARCO to Tosco, when gasoline was accepted, but those payments were security arrangements, and were in equal amounts. In substance, the Agreement was an in-kind transaction in which crude oil was exchanged for gasoline.

[SER p. 455 n.7] ARCO's declaration also stated: "ARCO's cost for the gasoline delivered by Tosco was equal to ARCO's cost to produce and deliver the crude oil to Tosco since there were no net cash payments." [SER p. 455]

Rebel's expert witness, Dr. Keith Leffler, testified that

> In my Report I state that "[t]he gasoline received by ARCO from Tosco represents an increment to the supply of ARCO gasoline. The effective economic costs of the gasoline to ARCO thus indicates the marginal cost of ARCO gasoline." The calculation of the "economic cost" in what is effectively a barter situation of course requires determination of the value of what ARCO gives up. Regardless of whether ARCO bought the crude oil, produced the crude oil or was given the crude oil, the marginal costs to ARCO of obtaining the additional gasoline from Tosco is given by the value of that crude oil that they gave up.

[ER p. 194]. Leffler's statement echoes ARCO's labelling of the agreement as an in-kind transaction, but his cost measure ment is different. ARCO states that the cost to it was the cost of producing and delivering the crude oil; Leffler states that the cost is instead the market price of the crude oil, i.e. what ARCO would have received for the crude oil if ARCO had sold it rather than traded it to Tosco.

[8] The measure of cost proposed by Rebel--the market price of the crude oil--is problematic for two reasons. First, the market price for crude oil is not what ARCO spent in obtaining the crude oil: ARCO produced the crude oil, and did not purchase the crude oil on the market. Second, the market price represents only what ARCO would have received had ARCO sold the crude oil in the market rather than trading it to Tosco for gasoline. The measure of marginal cost proposed by Rebel is thus really the opportunity cost to ARCO of choosing to enter into the exchange agreement rather than selling the crude oil elsewhere. Opportunity costs are vastly different from ARCO's marginal or variable costs, and we agree that "the use of the concept of

opportunity costs [to show predatory pricing] must be held improper as a matter of law." In re IBM Peripheral EDP Devices Antitrust Litig., 459 F. Supp. 626, 631 (N.D. Cal. 1978); Continental Airlines, Inc. v. American Airlines, Inc., 824 F. Supp. 689, 701 (S.D. Tex. 1993) (opportunity cost is not one of the costs of implementing a particular business choice, and cannot be included in considering average variable price).

[9] Rebel's expert, Dr. Leffler, admitted that "it's accepted that ARCO was a low cost producer of crude in this era so, if anything, I would expect it to have lower cost than what was reflected in the market value of that barrel. " [SER p. 202]

Aside from this admission that ARCO's cost of producing the crude oil was low, Rebel presented no evidence of the actual costs of production. Nevertheless, Leffler argued for the use of market price as a measure of ARCO's cost, taking strong issue with the "courts' language in rejecting . .. the economic concept of opportunity costs for measuring below cost sales in predatory pricing cases." [ER p. 193 n.5 ] Because Rebel offered "evidence" (Leffler's expert opinion) in its opposition to ARCO's summary judgment motion, and ARCO did not offer conflicting expert opinion, Rebel argues that "the district court acted as a finder of fact," impermissibly weighing Rebel's evidence and effectively conducting a bench trial. But where, as here, the expert offers an opinion that courts have rejected as a matter of law, that opinion is not enough to create an issue of material fact that survives summary judgment. "In the context of antitrust law, if there are undisputed facts about the structure of the market that render the inference [to be drawn from expert affidavits] economically unrea sonable, the expert opinion is insufficient to support a jury verdict." Rebel I, 51 F.3d at 1435-36 (citing Eastman Kodak

Co. v. Image Technical Serv., Inc., 504 U.S. 451, 468-69 (1992)). "Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them. " Brooke Group, 509 U.S. at 242; Wallace v. Bank of Bartlett, 55 F.3d 1166, 1170 (6th Cir. 1995), cert. denied, 516 U.S. 1047 (1996).

[10] We conclude that using the Tosco agreement as a measure of ARCO's cost in the way urged by Rebel would require equating ARCO's cost of the crude oil to market price, which is counter to legal definitions of cost. Therefore, the agreement cannot provide a legally sufficient measure of ARCO's cost.

C. The Los Angeles "Rack Price"

Rebel alleges that ARCO's wholesale prices in Las Vegas were below the wholesale "rack price" in Los Angeles, and were therefore predatory.

[11] "Rack prices" are the prices charged by marketers for gasoline deliveries "at the rack," sales in small tanker-truck quantities at loading-rack distribution points. Leffler acknowledged that "ARCO doesn't post a rack price or make sales at a rack price," [SER p. 219] but stated that the cost of buying gasoline at the Los Angeles rack plus transportation costs (over the Cal-Nev pipeline) equalled the cost an efficient seller would face in Las Vegas. Rebel contends that this rack price is an adequate proxy for ARCO's marginal cost, and because ARCO sold wholesale gasoline in Las Vegas below that price/cost, ARCO's price was predatory.

[12] The district court concluded that Rebel's comparison of wholesale prices in Las Vegas and Los Angeles showed only that ARCO charged a lower price in Las Vegas. Because

"Rebel has made no showing of ARCO's actual costs of producing gasoline," however, Rebel still had not created a factual issue regarding whether the Las Vegas price was below ARCO's costs. Rebel II, 957 F. Supp. at 1203-04.

[13] Using the rack price as a measure of cost would substitute a market price for ARCO's actual costs. We affirm the district court's conclusion that the evidence of rack price was insufficient to create a material question of fact whether ARCO's Las Vegas prices were predatory.

D. Losses at PSI Outlets

Another Rebel witness, Harry Holcombe, reviewed the income statements of ARCO's PSI stations and concluded that almost all the stations lost money during the alleged predatory period. Because ARCO sold PSI wholesale gas and PSI stations lost money, Holcombe stated that this demonstrated that ARCO was willing to lose money by pricing gas at its PSI outlets below the outlets' cost of obtaining the gas.

There are a number of reasons why this does not present a triable issue. First, the district court excluded Holcombe's testimony regarding "economic measurements and concepts such as the measurement of below marginal or average variable cost selling, recoupment, and data supporting price discrimination." [ER p. 274] His testimony was restricted to general industry practices. Nevertheless, the district court in Rebel II chose to address his testimony so as to address the PSI method of determining cost. Rebel II, 957 F. Supp. at 1203 n.20.

[14] Second, PSI is a wholly-owned subsidiary of ARCO, and Holcombe stated that PSI had no independent existence. Under these circumstances, the price paid by PSI to ARCO is

a transfer price, not a sale. Brown v. Hansen Publications, Inc., 556 F.2d 969, 971 (9th Cir. 1977). If PSI and ARCO are a combined unit, the costs of ARCO and PSI together must be considered, not simply PSI's costs versus its sales. Vollrath, 9 F.3d at 1460-61 (if entities are considered a combined unit, "then the appropriate consideration is the costs of the combined group to determine if the combined group sold below its costs"); Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 749 (1st Cir. 1994) (100% ownership makes firm and subsidiary single person under Robinson-Patman Act). Finally, income statements such as those analyzed by Holcombe may show that PSI stations lost money, but such statements alone are not sufficient to show that below-cost sales were made. Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 858 (9th Cir. 1978) (as amended), cert. denied, 439 U.S. 829 (1978) (although conventional business records do provide information to use in calculating costs, the inclusion of other nonvariable costs in conventional records, such as depreciation, taxes, and licenses, means that "a firm's marginal costs cannot be ascertained from conventional business records").

II. Daubert Ruling

In its ruling on Rebel's expert witness testimony, a week before its summary judgment ruling, the district court held that Leffler's opinions were admissible under Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993). Rebel contends that the later grant of summary judgment in ARCO's favor and the district court's rejection of Leffler's conclusions is irreconcilable with the admission of Leffler's testimony.

[15] "The test [for the admission of expert testimony] under Daubert is not the correctness of the expert's conclusions but the soundness of his methodology." Daubert v. Merrell Dow

Pharms., Inc., 43 F.3d 1311, 1318 (9th Cir.), cert. denied, 516 U.S. 869 (1995) (on remand from Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)). As the district court's Daubert order explicitly stated, "Whether Leffler's cost analysis is an economically valid method is [a] different question from whether it is legally sufficient to support a price discrimination claim." [ER p. 275] The district court's conclusion at summary judgment that Leffler's testimony was not legally sufficient evidence to create a question of material fact regarding whether ARCO priced its gasoline below its costs is not inconsistent with its conclusion following the Daubert hearing that Leffler's methodology was sound. An expert witness may be qualified to testify even though the expert's conclusions are legally incorrect. See General Elec. Co. v. Joiner, 118 S. Ct. 512, 519 (1997) (district courts may reject expert testimony that is based on sound methodology when "there is simply too great an analytical gap between the data and the opinion proffered").

The Daubert ruling did not require the district court to deny ARCO's motion for summary judgment.

III. Predatory Intent

Rebel complains that the district court sua sponte raised the issue whether ARCO had predatory intent and then decided that Rebel had not produced evidence that would allow a jury to find "clear and convincing evidence" of that intent. See Rebel II, 957 F. Supp. at 1203-04. Rebel claims this was improper because it had no notice that intent was in issue because ARCO did not address intent in its motion, and Rebel therefore had no opportunity to address the issue. Because we conclude that a showing of predatory intent is not sufficient in the absence of below-cost pricing to establish an antitrust violation, we do not decide this issue.

[16] In Brooke Group, the Supreme Court made it clear that predatory intent alone, no matter how clear and convincing the evidence, cannot substitute for a plaintiff's failure to dem onstrate a reasonable prospect of recoupment. See 509 U.S. at 222-23 (below-cost pricing and reasonable prospect of recoupment required). In reviewing the sufficiency of the evidence, the Court stated:

> the record contains sufficient evidence from which a reasonable jury could conclude that Brown & Williamson envisioned or intended this anticompetitive course of events. There is also sufficient evidence in the record from which a reasonable jury could conclude that for a period of approximately 18 months, Brown & Williamson's prices on its generic cigarettes were below its costs, and that this below-cost pricing imposed losses on Liggett . . . . Liggett has failed to demonstrate . . . that in pursuing this scheme, Brown & Williamson had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics. . . .
>
> No inference of recoupment is sustainable on this record, because no evidence suggests that Brown & Williamson--whatever its intent in introducing black-and-whites [generics] may have been--was likely to obtain the power to raise the prices for generic cigarettes above a competitive level.

Id. at 231-32 (citations and quotations omitted) (emphasis added).

[17] If intent cannot substitute for the required element of

recoupment, it likewise cannot establish an antitrust violation in the absence of evidence of below-cost pricing. Rebel did not establish a question of material fact regarding ARCO's below-cost pricing. The district court's discussion of intent was therefore unnecessary, and we need not discuss whether it was erroneous.2

AFFIRMED.

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FOOTNOTES

1 In Areeda and Hovenkamp's, Antitrust Law, supra, § 740, the authors describe footnote 1 of Rebel I (which stated "The cost of this `last barrel' of gasoline [in the Tosco agreement, discussed supra] represents ARCO's marginal cost for gasoline.") as follows:

> In the Ninth Circuit's Rebel Oil case the plaintiff alleged that the defendant was unable to supply gasoline at the predatory price from its own refineries, so it contracted to purchase more from an independent supplier, and paid more than it charged upon resale. If so, the resulting price was clearly below marginal cost. Further, as the court noted, that would be true of all sales made at that price, not only for the sales of the gasoline bought at a high price. "Marginal" cost does not look at the average cost, but the incremental cost of the last unit produced, which in this case was the higher cost units procured from the independent supplier.

Id. at p. 378 (emphases added) (footnotes omitted). Rebel claims that this shows that footnote 1 established the law of the case. We disagree. Rebel's selection from Antitrust Law states only what Rebel alleged: that the Tosco agreement represented a "purchase" for which ARCO "paid," and that "if so," the agreement would serve as a measure of marginal cost.

2 Because we affirm the grant of summary judgment on below-cost pricing, we do not address ARCO's challenge to the district court's decision on recoupment, nor do we address Rebel's argument regarding the measure of its damages. the end

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ORDER

CV-S-90-76-PMP (RLH)

REBEL OIL INC.,
a Nevada corporation,
and

AUTO FLITE OIL COMPANY, INC.,
a Nevada corporation,

Plaintiffs,

v.

ATLANTIC RICHFIELD COMPANY,
a Pennsylvania corporation,

Defendant.

Entered 2/28/97

Presently before the Court is Defendant Atlantic Richfield Company's ("ARCO") Motion in Limine to Exclude the Testimony of Plaintiffs' Expert Witnesses (#620), filed on November 18, 1996. plaintiffs Rebel Oil Company, Inc., and Auto Flite Oil Company, Inc., (collectively "Rebel") filed a Memorandum of Points and Authorities in Opposition to ARCO's motion (#629) on December 13, 1996. ARCO filed a Reply (#635) on December 30, 1996.

## I. Procedural Background

In January of 1990, Rebel filed an antitrust suit against ARCO under Section 4 of the Clayton Act, which allows private parties to sue for damages for violations of antitrust laws. Rebel sought relief under sections 1 and 2 of the Sherman Act, and under section 2 of the Clayton Act (as amended by the Robinson-Patman Act). This Court limited discovery to the issues of antitrust injury and whether ARCO had sufficient market power to charge prices above competitive levels. Rebel Oil Co. Inc.. v. Atlantic Richfield Co., 51 F.3d 1421, 1432 cert. denied, _ U.S. _; 116 S.Ct. 515 (1995) ("Rebel I') . This Court held that Rebel failed to put forth sufficient evidence of market power to support a jury verdict, and therefore failed to sufficiently prove antitrust injury, which is a necessary element of an antitrust claim.

Rebel appealed, and the Ninth Circuit Court of Appeals analyzed the issue of market power separately as to each of Rebel's three antitrust claims. Id. The Ninth Circuit Court of Appeals upheld this Court's grant of summary judgment in favor of ARCO on the Sherman Act attempted monopolization claims. Id. at 1443. The court reversed as to the Clayton Act claim for predatory pricing. The Ninth Circuit held that a lesser showing of market power was required for a claim of price discrimination, and that Rebel's showing of market power was enough to create a material issue of fact. Id. at 1448. The Court of Appeals therefore reversed and remanded as to Rebel's price discrimination claim only.

## II. Law of the Case

Rebel cites the Ninth Circuit Court of Appeal's decision in as law of the case, arguing that it prohibits this Court from excluding Rebel's expert testimony. The law of the case doctrine provides that an appellate court's decision

of legal issues must be followed in all subsequent proceedings either in the same case in the trial court or on a later appeal. Vucinich v.Paine, Webber, Jackson & Curtis, Inc., 803 F.2d 454, 459 (9th Cir 1986). Exceptions to the law of the case doctrine exist when evidence in a subsequent trial is substantially different, controlling authority has made a contrary decision of law that applies to the issues previously decided, or the decision was clearly erroneous and would work a manifest injustice. Id. The law of the case encompasses both a court's explicit decisions, and those issues decided by necessary implication. Eichman v. Fotomat Corp., 880 F.2d 149, 157 (9th Cir. 1989)

Rebel argues that ARCO's Motion in Limine must be denied based on the Rebel I decision. In Rebel I, ARCO filed, along with its Motion for Summary Judgment, "Evidentiary Objections" challenging the admissibility of Rebel's expert witnesses. The only two current Rebel experts that offered testimony in Rebel I are Keith Leffler ("Leffler") and Thomas Carroll ("Carroll") . In its Opposition Brief (#629), Rebel states that the Ninth Circuit Court of Appeal's decision held that Rebel had sufficient admissible expert evidence to get to the jury on its price discrimination claim. Rebel argues that many of ARCO's current objections to Leffler and Carroll's testimony are merely attempts to rehash arguments that the Ninth Circuit Court of Appeals found insufficient to warrant excluding Rebel's expert testimony.

The law of the case doctrine addresses *legal issues* decided by a court, not "observations, commentary, or mere dicta touching upon issues not formally before the Court." Gertz v. Robert Welch, Inc., 680 F.2d 527, 533 (7th Cir. 1982), cert. denied 459 U.S. 1226 (1983). Any issue not expressly or impliedly dealt with on appeal is open for the

trial court's consideration on remand. Beltran v. Myers, 701 F.2d 91, 93, cert. denied, 462 U.S. 1134 (1983). As the Seventh Circuit Court of Appeals found in Gertz, "It is critical to determine what issues were actually decided in order to define what is the 'law' of the case." 680 F.2d at 533. Thus, the only law of the case applicable here relates to the issues that were actually decided by the Ninth Circuit Court of Appeals in

ARCO's Motion in Limine involves key distinctions between Rebel I and the case currently before this Court. First, Rebel I only dealt with the expert opinions contained in the parties' Motions for Summary Judgment. Any new expert testimony must survive a Daubert and Federal Rules of Evidence analysis, as discussed infra.[1] Secondly, there is a distinction between 579 (1993); Federal Rules of Evidence 702 and 703. Since only whether the expert testimony was sufficient to support a motion for summary judgment, and whether under a Daubert analysis it will be admissible at trial. In Rebel I, the court held an expert's testimony was appropriate to rely on for summary judgment when the factual details and reasoning for that experts' testimony were not disclosed. 52. F.3d at 1435. The court also noted that while Rebel's expert's opinion met this basic standard, the inferences drawn from that opinion must be sufficient to support a favorable jury verdict. Id. The court went on to address situations involving economic testimony, and found that underlying market conditions may render an expert opinion unreasonable and inappropriate to rely on in determining a motion for summary judgment. Id. at 1436.

The issue before the court in Rebel I is not the issue before the Court at this juncture. ARCO is attacking the reliability of Rebel's experts under a Daubert analysis. The court in Rebel I relied on Bulthuis v. Rexall Corp., 789

F.2d 2.32.5 (9th Cir. 1985), which dealt with expert testimony under Fed. R. Ev. 705. Rule 705 states that an expert may first testify without first disclosing underlying facts or data. The Bulthuis court allowed such testimony for a summary judgment motion, as long as the inferences stated in the expert's opinion were reasonable. Here, ARCO is not attacking Rebel's experts due to their failure to disclose underlying facts or data. Instead, ARCO argues that Rebel's experts' testimony is inadmissible under Daubert due to the *improper* factual basis, flaws in the methods used, or that the experts themselves are not qualified. Thus, Rebel I is not law of the case as to these issues.

Rebel I is law of the case only as to the showing of ARCO's market power and the issues necessarily implied by that showing. If there is substantially different evidence as to the content of an expert's testimony or the basis for that testimony, an exception to the law of the case doctrine exists. These distinctions must be kept in mind when analyzing which expert testimony is admissible at trial.

## III. Rebel's Expert Testimony

In Daubert, the Supreme Court set forth the standard for determining the admissibility of expert evidence in relation to Federal Rules of Evidence 702 - 705. Federal Rule of Evidence 702 provides that expert testimony is admissible if it will assist the trier of fact to understand the evidence or determine a fact in issue. Clearly, such evidence will only assist the trier of fact if the evidence is reliable. In Daubert, the Court rejected general acceptance within the scientific community as the relevant admissibility standard.[2] Instead, the Court articulated the proper inquiry as whether the reasoning or methodology underlying the testimony is scientifically valid, and whether it can properly be applied to

the facts at issue. 509 U.S. at 592-93. Expert testimony must be sufficiently tied to the facts to aid the jury in resolving a dispute. Id. at 591. The Court set forth several factors to analyze, including whether the testimony or methodology used can be tested, and whether it has been subjected to peer review or publication. Id. at 593. These factors are relevant, but not dispositive. Id. The key to a Daubert analysis of expert testimony is determining the validity, relevance and reliability of the principles and methodology utilized by experts, not the expert's conclusions. Id. at 594-95.

Rebel argues that Daubert is inapplicable to the present case, as economics is a "soft science" not requiring a Daubert analysis. Rebel is incorrect. The Supreme Court specifically stated that Daubert applies not only to traditional scientific methods and analysis, but to "technical, or other specialized knowledge." 509 U.S.. at 590. Furthermore, the Advisory Committee Notes to Rule 702 state that testimony of such non-scientific experts as bankers and landowners can fall within Rule 702's parameters. In Daubert, the Court noted that expert testimony can be powerful and quite misleading. 509 U.S. at 595. This is especially true in the case of economic testimony, as there is no real way to calculate rates of error or mistake. Thus, it is a court's duty to ensure that such testimony is well grounded in the relevant facts and that the methods of statistical and economic analysis meet the Daubert standard.

### A. Professor Thomas Carroll

In evaluating Rebel's experts, this Court must distinguish between issues of expert methodology and reliability under Daubert and disputes over the experts' conclusions, which are properly left to the jury. In its Motion, ARCO lists four separate reasons why Carroll's testimony is

inadmissible. Essentially, there are two issues involved: 1) Carroll's calculation of the Herfindahl-Hirschman Indices ("HHI") for the Las Vegas retail gasoline market from 1980 through 1991, and 2) The information Carroll relied on in determining retail market shares.

### 1. Carroll's Calculation of the HHI

Market concentration may be measured by economists utilizing the HHI. The HHI is calculated by squaring the market share of each firm, then summing these numbers to obtain a concentration index number for the market as a whole. ARCO alleges that Carroll departed from accepted economic methodology, in violation of Daubert, by aggregating firms with less than 5 percent market share into a category called "other" and squaring this category. ARCO alleges that this is improper, and that the HHI requires the separate market shares of *all* firms to be computed. ARCO also argues that Carroll improperly combined the individual retailers or dealers of each brand of gasoline into a single "firm," when every dealer's market share should have been calculated separately.

ARCO has failed to show that Carroll departed from accepted methods of calculating the HHI in a manner which violates the Daubert test. The HHI may be utilized when there is incomplete market data, and the uncertainty as to the market share of a very small firm is rarely a significant problem. N.B. Cohen & C.A. Sullivan, The Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration, 62 Tex. L. Rev. 453, 477 (1983). ARCO may disagree with the method in which Carroll calculated the HHI, but it has failed to establish that method is inadmissable under the Daubert. standard. As the Supreme Court stated in Daubert ARCO is

free to attack the credibility of Carroll's method, since "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596.

Rebel's combining of dealers of each brand of gasoline into a single "firm" is proper under Daubert.. In fact, in Rebel I, the Ninth Circuit Court of Appeals specifically approved of this Court's aggregation of all ARCO branded stations in order to analyze Rebel's premise that ARCO's market share was 44 percent. 51 F.3d at 1438. Whether or not all retail dealers should be looked at together, since supply and price are determined by the branded supplier, or whether retailers retain the autonomy to warrant individual scrutiny, is a disputed conclusion properly decided at trial. ARCO has failed to show that this aggregation is improper economic methodology under Daubert therefore Carroll's testimony in this regard is admissible at trial.

**2. The Basis for Carroll's Market Shares Calculations**

ARCO also argues that Carroll could not calculate retail shares based on the State of Nevada "taxable sales reports" because not all retailers and resellers are listed. However, in its Reply Memorandum (#635), ARCO states that its primary objection is to Carroll's "unwarranted methods and reliance on the unreliable and self-serving guesswork of Rebel's officer, Mr. Bailey." (ARCO's Reply, p. 7).

In calculating market shares, Carroll turned the taxable sales reports over to Rebel's officer Carl Bailey ("Bailey"), in order to determine the number of gallons of gas

sold at retail stations versus the number sold to commercial suppliers and the number sold outside the Las Vegas area. Bailey did not rely on any documents in making this determination (Bailey Deposition, "Bailey Depo." p. 92), and admitted that he lacked personal knowledge as to these figures.[3] In fact, in calculating the volume of sales at one Chevron station, Bailey based his figures on the fact that Rebel had a nearby station that outsold Chevron. He calculated Chevron's sales by "cut [ting] our numbers down to fit what I thought [Chevron's] volume should be." (Bailey Depo. p. 96). Bailey also based the number on information that he received from a man who at one time managed both stations, whose name he could not recall and who Bailey remembered talking to in either 1990, 1991, or 1992. (Bailey Depo. p. 96-97)

Carroll's utilization of data altered by a party in interest in this case, based entirely on that party's speculation and conjecture is an insufficient factual basis for Carroll's analysis under Daubert Data supplied by a party in interest about competitor's sales volumes in an antitrust case is inherently unreliable, and certainly would not be generally accepted by other experts in the field of economics as a valid database. Such uncertain information cannot assist the trier of fact under a Rule 702 analysis. This Court must act as a gatekeeper to ensure the reliability of expert testimony. There is no objective indicia of reliability for Carroll's underlying information.

In defense of Carroll's reliance on Bailey's advice, Rebel merely states Carroll's opinion that "people generally understand their own business" and that "[business people] have remarkable understandings of their market." (Carroll Deposition at 40). Carroll's opinion as to Bailey's knowledge is insufficient to overcome Rebel's burden under the Daubert

case. Rebel has failed to show that this basis for Carroll's opinion is reliable or valid economic methodology. Therefore Carroll's testimony as to market shares, to the extent it is based on Bailey's calculations, is inadmissible.

## B. Harry Holcombe

ARCO further *argues* that Rebel's expert Harry Holcombe ("Holcombe") is not qualified to testify as an economic expert. Rebel has stipulated that Holcombe will not testify as an "antitrust economist," and that he will not duplicate the testimony of Leffler. Rebel states that Holcomnbe will testify as to the operation and structure of the oil industry in Las Vegas and Los Angeles. However, Rebel goes on to state that this will include the issues of barriers to entry, data supporting price discrimination, the measurement of below-cost selling, recoupment, and other "subjects on which he is qualified by virtue of his background, training and experience." (Rebel Opposition Brief p.25)

Holcombe is a Certified Public Accountant with extensive experience in the marketing of petroleum products. He is qualified as an "industry expert," testifying about petroleum industry practices in general.[4] Such testimony will be admissible to the extent it is relevant, and will aid the trier of fact in deciding a material issue in the case. See Daubert, 509 U.S. at 591.

Determining whether general industry practice is relevant is a decision best left for trial. As the factual context of Rebel's case and ***ARCO's*** defenses develop at trial, this Court will be able to determine the extent that industry practices will be relevant and admissible.

As stipulated by Rebel, Holcombe is not qualified to testify as an "antitrust economist". Therefore, he may not testify as to studies, methodology, or conclusions based in the economic field. Holcombe does not have the training or experience necessary to qualify him to testify about concepts unique and specific to economic study. Holcombe's deposition testimony revealed that he is not adequately able to define concepts basic to pricing analysis, such as average, long and short run costs. (Holcombe Depo. 81-84). As the Supreme Court noted in Daubert, expert testimony can be powerful and misleading, and this Court has a duty to ensure that experts testifying in the complex area of economic cost measurements and antitrust issues are well qualified to do so. See 509 U.S. at 595. Holcombe's general work experience in the petroleum industry does not qualify him to testify about economic measurements and concepts such as the measurement of below marginal or average variable cost selling, recoupment, and data supporting price discrimination.

Therefore, Holcombe's testimony is admissible as to relevant general industry practices, which will be more fully developed at trial. Holcombe's economic testimony or interpretation of Leffler or Carroll's economic testimony is, however, inadmissible.

## C. Keith B. Leffler

ARCO's objections to Leffler's testimony fall into three basic categories: 1) Leffler's measurements of cost, 2) The factual basis upon which Leffler rests his expert opinion, and 3) That Leffler's opinions are not supported by analysis.

### 1. Costs Measurements

ARCO argues that Leffler compares ARCO's prices in Las Vegas and Los Angeles, which is an improper opportunity cost based on price, and irrelevant to ARCO's true marginal or average variable costs, which are the appropriate cost measurements for a predatory pricing claim. ARCO alleges that Leffler did not look at average variable costs under a traditional economic analysis, since this method was too difficult. ARCO also argues that Leffler has no peer review or publications to back up his use of a Los Angeles/Las Vegas price comparison. ARCO further alleges that Leffler did not conduct a baseline comparison to determine if the Los Angeles and Las Vegas markets are similar enough to warrant a comparison.

In determining if Leffler's comparison of Los Angeles and Las Vegas prices is admissible, this Court must keep in mind the key to a Daubert analysis: the validity, relevance, and reliability of the principles and methodology utilized by experts, not the expert's conclusions. 509 U.s. at 594-95. Whether Leffler's cost analysis is an economically valid method is different question from whether it is legally sufficient to support a price discrimination claim. It is true that Rebel has not cited any peer review or publication utilizing Leffler's method. However, these factors are not dispositive. Id. at 593. ARCO has made no showing that price comparisons between two geographic markets are improper methods of economic analysis. Leffler has offered testimony that the Los Angeles market is a very competitive market. ARCO has offered testimony that the costs of entry such as the transportation costs over the Cal-Nev pipeline are low. Therefore, Leffler's use of the Los Angeles price plus a transportation differential is a valid methodology sufficient to be admitted at trial.

ARCO will no doubt have extensive arguments to offer regarding Leffler's credibility, and the correctness of this cost measure. At trial, ARCO will have the opportunity to vigorously cross-examine Leffler and offer contrary evidence to his opinions. This is also true as to the characteristics of the Los Angeles and Las Vegas markets. ARCO has not shown that the two markets are so dissimilar that an economic comparison of prices is invalid. It may be that the two markets are not similar enough to ***legally*** infer that the costs of producing gas in Los Angeles are comparable to the costs in Las Vegas. Rebel will bear the burden of proving this at trial. However, the analysis under Daubert only requires that the method be a valid economic method, not that it be a method that courts have previously utilized or recognized. ARCO has failed to show that Leffler's method is economically invalid, therefore it is admissible.

**2. Leffler's Factual Basis**

ARCO argues that Leffler improperly relied on Carroll's market share tables in his report. ARCO also argues that Leffler relied on Dr. Fenili's calculations in formulating his opinion, and that this was improper, as an expert cannot rely on database if the expert is unaware of the methods used to create it.

As previously stated, Carroll's calculation of market shares was based on inherently unreliable information obtained from Bailey, a party in interest to this case. As such, it is inadmissible. To the extent that Leffler relies on this information, or Carroll's calculations from this information, his testimony will be inadmissible as well.

In terms of Leffler's use of Fenili's calculations, while Leffler may not have been aware of every detail of Dr.

Fenili's calculations, Leffler was sufficiently aware of the methods and data used to render his opinion reliable and admissible. Leffler's deposition reveals that he was aware of the nature of the data used and the methods used, and that the economic methodology used met with his approval. This is sufficient to render Leffler's study admissible. Any flaws in the calculations or gaps in Leffler's knowledge of the data can be explored by ARCO on cross-examination or with contrary testimony. These tools will be sufficient allow the jury to determine Leffler's credibility.

### 3. Leffler's Supporting Analysis

ARCO alleges that Leffler fails to support his opinion with analysis. ARCO argues that Leffler cited several factors as barriers to entry, without providing a study, providing supporting data or investigating whether these factors actually impeded entry into the Las Vegas market. ARCO also alleges that these barriers were analyzed only in the retail market, and that Rebel is alleging a disciplined oligopoly in the wholesale market. ARCO also contends that Leffler's Supplemental Report contains no scientific analysis, and that Leffler used figures from Holcombe, without underlying documents as to how he obtained this information.

Leffler's testimony as to barriers to entry is not inadmissible merely because he fails to cite analysis that these factors in fact excluded retailers from entering the Las Vegas market. Leffler may testify as to what barriers to entry are, what economists consider effective barriers to entry, and whether those factors exist in the Las Vegas market. Rebel does not need to prove that these conditions were in fact barriers to entry in order for Leffler's testimony to be valid under a Daubert analysis. ARCO will be free at trial to

cross-examine Leffler as to whether those factors actually excluded entry into the Las Vegas market, and offer conflicting expert testimony. It will also be more appropriate to determine at trial which barriers affected the wholesale market and which barriers affected the retail market. Leffler's testimony is admissible, but Rebel will still bear the burden of proving that effective barriers to entry existed in Las Vegas.

Leffler is clearly a qualified economics expert. As economists often do, he may comment on market information and offer his expert opinion as to what the economic consequences or meaning of those conditions are. Therefore, the fact that every opinion offered by Leffler is not explicitly supported by a scientific study or extensive analysis is not fatal. Leffler's testimony will still meet the threshold showing for admissibility as long as the testimony offered is relevant. If Leffler's testimony is irrelevant, or entirely unsupported by the facts and outside the realm of his expertise, ARCO will be free to argue this and object at trial.

D. **Clifford Beadle**

ARCO argues that Clifford Beadle's ("Beadle") expert testimony should be excluded because Beadle's damages are entirely speculative, and based on unsupported assumptions about hypothetical sales growth. ARCO also contends that Beadle improperly excluded all of Rebel's wholesale gasoline sales from his calculations.[5]

ARCO has failed to show that Beadle's accounting methods of calculating damages are invalid under a Daubert analysis. Beadle based his estimates of retail margins on a review of Rebel's actual margins prior to 1986, upon consultation with Leffler and Holcombe, and upon a review of various Lundberg Price Surveys for the Los Angeles

gasoline market. (Beadle Report p.2). ARCO has not shown that these are invalid methods of determining retail margins. This threshold showing is sufficient to find Beadle's testimony admissible at this stage of the proceedings. The issue of whether these margins are the best measure of damages is a disputed issue for trial.

ARCO's true argument as to Beadle's calculations are to the legal sufficiency of those calculations and the conclusions Beadle reaches. These are not evidentiary questions, rather they are substantive arguments which are properly decided in an appropriate motion or by the trier of fact.[6]

In antitrust cases, as long as the fact of damage is certain, uncertainty of the extent of that damage is not fatal to a plaintiff's case. See Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) . In light of this rule, it is not fatal to the admissibility of Beadle's testimony that he uses hypothetical markets, assumes retail margins would continue, and fails to offset retail losses with wholesale gains.[7] Hypothetical markets are often the only way to prove damages in antitrust cases. This Court cannot judge the "speculativeness" of Beadle's testimony until evidence regarding the market, Rebel's pre-1986 performance and market conditions are more fully developed at trial. Beadle's testimony must merely meet the Daubert test of a valid accounting methodology. As ARCO has failed to show that Beadle's calculations are not reliable or relevant, this testimony is admissible.

IT IS THEREFORE ORDERED THAT ARCO's Motion to in Limine to Exclude the Testimony of Plaintiffs'

Expert Witnesses (#620) is GRANTED in Part and DENIED in Part as follows:

The Motion is GRANTED as to the testimony of Thomas Carroll to the extent his testimony relies on data obtained from Carl Bailey.

The Motion is GRANTED as to the testimony of Harry Holcombe which professes opinions which would be appropriate only as economic expert testimony.

The Motion is GRANTED as to the testimony of Keith B. Leffler to the extent his testimony relies on Thomas Carroll's inadmissible studies.

The Motion is DENIED in all other respects.

Dated: February 28th, 1997

Footnotes

1 See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Federal Rules of Evidence 702 and 703. Since only Leffler and Carroll's affidavits were before the Ninth Circuit, the law of the case doctrine is relevant only to their testimony.

2 General acceptance within the scientific community is permitted, but not required. Daubert, 509 U.S. at 594.

3 Bailey stated that the figures were his "best estimate" and that "that's the best answer that you're going to get because I don't have personal knowledge of those volumes." (Bailey Depo. p. 97)

4 ARCO argues that Holcombe should not be permitted to testify as to the conditions of the Las Vegas market due to his limited exposure to that market. However, Holcombe may testify as to general industry practices that would apply to firms in Las Vegas, and ARCO remains free to object at trial to any testimony other than general industry practices or testimony that is specific to Las Vegas.

5. ARCO also argues that Beadle should have included gasoline taxes in his report, a point that Rebel concedes. Therefore, Rebel has submitted an Addendum (Joint Ex. 2F to Rebel's Opposition correcting this error.

6 ARCO has raised nearly identical arguments concerning Rebel's damages calculations in its Motion for Summary Judgment
(#617) .

7 Rebel may be required to offset retail losses with wholesale gains when proving damages at trial, since Rebel is alleging a disciplined oligopoly in the wholesale market. See Rebel I 51 F.3d 1421. However, this does not affect Beadle's methodology of calculating losses under a Daubert analysis.

(Footnotes Trail Opinion)
United States Court of Appeals,
Ninth Circuit.

No. 92-16932.

REBEL OIL COMPANY, INC., a Nevada corporation; Auto Flite Oil Company, Inc., a Nevada corporation, Plaintiffs-Appellants,
v.
ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation, Defendant-Appellee.

Argued and Submitted Dec. 16, 1993.

Decided April 7, 1995.

William H. Bode, William H. Bode & Associates, Washington, DC, for plaintiffs-appellants.

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Appeal from the United States District Court for the District of Nevada.

Before: POOLE, BEEZER and KLEINFELD, Circuit Judges.

BEEZER, Circuit Judge:

This case presents three antitrust claims arising from the defendant's conduct in the retail gasoline market in Las Vegas, Nevada. The plaintiffs contend that the defendant engaged in predatory pricing between 1985 and 1989, selling self-serve, cash-only gasoline below marginal cost. The plaintiffs claim that the alleged predatory pricing was an attempt by the defendant to monopolize the market, in violation of Sherman Act § 2. The plaintiffs also claim that the predatory pricing scheme involved a conspiracy to restrain trade, in violation of Sherman Act § 1, and primary-line price discrimination, in violation of Clayton Act § 2, as amended by the Robinson- Patman Act, 15 U.S.C. § 13(a).

The district court granted summary judgment in favor of the defendant on all three antitrust claims, concluding that the defendant did not possess enough power in the market to allow the predatory scheme to succeed, and therefore that the plaintiffs had not suffered any injury cognizable under the antitrust laws. We have jurisdiction over the plaintiffs' timely appeal. 28 U.S.C. § 1291. We affirm in part and reverse and remand in part.

I

The evidence before the district court on summary judgment reveals the following facts: Gasoline sold in Las Vegas is first produced from crude oil in Los Angeles refineries. Wholesale marketers then pump the gasoline to Las Vegas storage terminals via a common carrier pipeline operated by the Cal-Nev Pipeline Co. ("Cal-Nev"). Ninety-five percent of Las Vegas' gasoline travels this 250-mile route. Wholesale

marketers sell the gasoline to retail marketers, who then sell the gasoline to Las Vegas motorists.

As of 1991, there were more than 275 retail gasoline stations in Las Vegas. Although the grades and types of fuel vary, retailers sell gasoline through two types of service. Some gasoline is sold only on a self-serve, cash-only basis. Motorists purchasing this product must pump their own gasoline and must pay cash. Other gasoline is sold on a full-serve basis. In full serve, a service station attendant pumps the gasoline for the consumer, checks the oil and tires, washes the windows and may perform other minor services. The motorist also has the option of paying either with cash or a credit card. The consumer pays a premium for these services, which means that the price for full-serve gasoline is generally higher than the price for self-serve gasoline. Some retail marketers sell only self-serve, cash-only gasoline; others sell both self-serve, cash-only gasoline and full-serve gasoline. No marketer sells only full-serve gasoline.

The plaintiffs, Rebel Oil Co., Inc., and Auto Flite Oil Co., Inc. (collectively "Rebel"), are retail marketers of gasoline in Las Vegas who sell only self-serve, cash-only gasoline. Rebel operates 16 retail stations under various gasoline brand names. Nine stations operate under the "Rebel" brand name, six stations operate under the "Unocal" brand name and one operates under the "Texaco" brand name. In addition to its retail sales, Rebel is one of the several wholesale marketers who ship gasoline via the Cal-Nev pipeline and sell to retail marketers.

The defendant, Atlantic Richfield Co. ("ARCO"), is a retail and wholesale marketer of gasoline in Las Vegas, as well as a major driller and refiner of crude oil in Los Angeles. ARCO supplies gasoline to 53 retail stations in Las Vegas bearing the

"ARCO" brand name. These stations sell only self-serve, cash-only gasoline. Of those 53 stations, Prestige Stations, a subsidiary of ARCO, owns and operates 15 stations. The remaining 38 stations are owned and operated by independent dealers who purchase the gasoline wholesale from ARCO and then sell the product at retail for their own account. Thirteen of these dealer stations are leased from ARCO; the remaining 25 dealer stations are operated by "contract dealers" who either own the stations or lease from third parties. The largest "contract dealer" is Terrible Herbst, Inc. ("Terrible Herbst"), which controls 23 stations under the "ARCO" brand name.

Besides Rebel and ARCO, other major retail marketers of gasoline in Las Vegas are Southland Corp. and Texaco Inc. As of 1991, Southland owned and operated 89 "7-11" stations, and Texaco owned and operated five gasoline stations. In addition, numerous independent dealers sell under varying brand names. These dealers either own the stations or are franchised dealers. Although the parties offer conflicting numbers, it is undisputed that at least 67 independent dealers sell under the "Texaco" brand name; 16 independent dealers sell under the "Unocal" brand name; 17 independent dealers sell under the "Chevron" brand name; and 12 other independent marketers sell under various names. The number of stations operated by a marketer does not necessarily determine that marketer's share in gasoline sales. The "7-11" stations, for example, sell far less volume in gasoline than other marketers because their sales are primarily in the grocery retail market.

The facts of this case developed against a backdrop of change in the gasoline business. In the era of high fuel consumption motor vehicles, major- brand marketers affiliated with major oil companies were dominant. They enjoyed superior

locations and facilities, national advertising, and customer loyalty. Independent marketers, who purchased gasoline from major oil companies for resale under their own brand name, were minor participants-- "middle-of-the-block dumps," in ARCO's words. Because they sold only self- serve, cash-only gasoline, independent marketers enjoyed low overhead and, hence, could charge less than stations selling equivalent quality gasoline under major brand names. During the 1970s, a growing number of cost-conscious motorists patronized these independent marketers. Independent marketers saw substantial growth in their business. Taking a cue, ARCO in 1982 adopted a nationwide strategy to compete directly with the independent discount marketers. Developed by ARCO's Special Planning Unit (SPU), the new strategy called for the elimination of full-serve and credit-card sales. Under the SPU's new strategy, all sales would be self-serve and cash-only. Dealers would be provided with incentives, such as volume discounts, to increase sales volume and match the prices of the discount independents. In an internal memorandum, the SPU predicted that "depending on the degree and rapidity of competitive attrition, a lasting period of quite acceptable profitability could ensue." ARCO's new strategy increased its sales and market share nationwide.

In January, 1990, Rebel filed this antitrust suit against ARCO, pursuant to Section 4 of the Clayton Act, which allows private parties to sue antitrust violators for damages. Rebel claims that between 1985 and 1989, ARCO executed the SPU's new strategy in Las Vegas with "more specific vengeance," charging predatory prices in an attempt to take away market shares from its competitors and, eventually, monopolize the gasoline market in Las Vegas. Relying on affidavits obtained from former ARCO dealers, Rebel claims that ARCO controlled not only the prices charged at the 15 stations it operated through its subsidiary, Prestige Stations,

but also the prices charged at the 38 stations operated by independent dealers. Rebel also obtained affidavits from an expert who compared ARCO's prices in Los Angeles and Las Vegas markets. ARCO supplies both markets with gasoline from the same Los Angeles refinery. The expert concluded retail prices in Las Vegas for self-serve, cash-only gasoline, when adjusted for transportation costs, were consistently 6 to 14 cents per gallon below those charged in Los Angeles. The expert concluded that ARCO's retail prices in Las Vegas were consistently below the wholesale prices of all other wholesale suppliers in Las Vegas, and at times were 10 cents or more per gallon below ARCO's marginal cost. [FN1] Rebel contends that Terrible Herbst, ARCO's major contract dealer, conspired with ARCO in the predatory scheme.

Rebel asserts that ARCO's pricing scheme forced 37 competitors out of the Las Vegas gasoline market, including both independent discount marketers and major oil companies, such as Exxon, Shell, Conoco, Mobil and Philips. According to Rebel, non-ARCO stations decreased in number, from 258 to 222, during the alleged predation. Rebel contends that the marketwide attrition occurred despite the fact that Las Vegas is one of the fastest growing retail gasoline markets in the United States. Rebel's own share of the self-serve, cash-only gasoline market dropped from 30 percent in 1982 to less than 10 percent in 1990. Rebel claimed losses totalling $2 million. Rebel was forced to mostly withdraw from the retail market and instead concentrate on the wholesale market. Rebel claims it has stayed in business only through its non-gasoline revenues.

According to Rebel's expert affidavits, when the alleged predation ended in 1989 ARCO had captured 54 percent of the market for self-serve, cash- only gasoline. The experts

contend that ARCO then engaged in price gouging in order to recoup the losses that resulted from the predatory scheme. To demonstrate that recoupment occurred, Rebel's experts compared ARCO's prices in Las Vegas with those charged in Los Angeles, adjusted for transportation costs. The data showed that from September 1989 through March 1990, and again from September 1990 through mid-April 1991, ARCO's prices in Las Vegas were between 4 to 19 cents per gallon higher than its prices in Los Angeles. Rebel contends that ARCO was able to charge prices above competitive levels without losing market share, demonstrating that ARCO had the power to harm competition in the gasoline market. Rebel contends that ARCO was able to maintain prices above competitive levels during the "recoupment" phase because Las Vegas marketers had been "disciplined" by ARCO's previous predation and refused to challenge ARCO's supracompetitive prices. In essence, Rebel contends that the Las Vegas gasoline market today is a "disciplined" oligopoly in which each oligopolist shares in the supracompetitive profits.

In the fall of 1990, the district court limited discovery solely to the issue of whether ARCO had sufficient market power to charge prices above competitive levels. Rebel Oil Co. v. Atlantic Richfield Co., 133 F.R.D. 41, 44 (D.Nev.1990) . The district court justified the limited discovery on the ground that, absent a showing of market power, Rebel could not demonstrate that it suffered "antitrust injury." Id. There was no discovery on predatory pricing, intent and collusion.

In the fall of 1992, the parties filed cross motions for summary judgment. The district court granted summary judgment in favor of ARCO on all three antitrust claims. Rebel Oil Co. v. Atlantic Richfield Co., 808 F.Supp. 1464 (D.Nev.1992) . The court concluded that ARCO's market

share in the retail gasoline market in Las Vegas was insufficient as a matter of law to establish market power. In addition, the court concluded that Rebel failed to demonstrate that barriers to entry prevented other retailers from entering the retail gasoline market. The combined lack of market share and entry barriers, the court said, indicated that ARCO lacked the power to charge prices above competitive levels as a means of recouping predatory losses. In essence, the district court held that Rebel failed to put forth sufficient evidence of market power to support a jury verdict. See Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986) (summary judgment appropriate if nonmoving party fails to put forth sufficient evidence for an element essential to case).

II

[1] Summary judgment is appropriate when the pleadings, affidavits and other material present no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. We review a grant of summary judgment de novo and evaluate the evidence most favorably to the nonmoving party to determine whether any genuine issues of material fact remain and whether the district court correctly applied the relevant substantive law. Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1373 (9th Cir.1989) .

Rebel contends that it produced sufficient evidence in the record regarding market power to create a genuine issue of material fact for trial for each of its antitrust claims. Rebel also argues that the court erred as a matter of law by applying a "monopolization" standard rather than an "attempted

monopolization" standard to the Sherman Act § 2 claim. Rebel also argues that while a showing of market power is necessary for the "attempt to monopolize" claim under Sherman Act § 2, no such showing is required for the price fixing claim under Sherman Act § 1 or the price discrimination claim under Clayton Act § 2. We analyze the issue of "market power" separately as to each of Rebel's three antitrust claims.

A

[2] Rebel's attempted monopolization claim is based on the theory that ARCO conspired with its dealers to set predatory prices in an attempt to gain monopoly power. To establish a Sherman Act § 2 violation for attempted monopolization, [FN2] a private plaintiff seeking damages must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving "monopoly power"; and (4) causal antitrust injury. McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir.1988) .

[3][4][5][6] The fourth element, causal antitrust injury, is an element of all antitrust suits brought by private parties seeking damages under Section 4 of the Clayton Act. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 697-98, 50 L.Ed.2d 701 (1977) . Under Section 4, private plaintiffs can be compensated only for injuries that the antitrust laws were intended to prevent. Id. To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior, since it is inimical to the antitrust laws

to award damages for losses stemming from acts that do not hurt competition. Atlantic Richfield Co. v. USA Petroleum, Inc., 495 U.S. 328, 334, 110 S.Ct. 1884, 1889, 109 L.Ed.2d 333 (1990) . If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal per se. See id.

[7][8][9][10][11] In deciding whether the plaintiff was injured by an anticompetitive aspect or effect of the defendant's behavior, care must be taken in defining "competition." Competition consists of rivalry among competitors. Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1040 (9th Cir.1987) , aff'd, 496 U.S. 543, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990) . Of course, conduct that eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman Act until it harms consumer welfare. Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 663 (7th Cir.1982) ; see Reiter v. Sonotone Corp., 442 U.S. 330, 343, 99 S.Ct. 2326, 2333, 60 L.Ed.2d 931 (1979) (Congress designed the Sherman Act as a "consumer welfare prescription") (quoting Robert H. Bork, The Antitrust Paradox 66 (1978)). Consumer welfare is maximized when economic resources are allocated to their best use. National Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City, 452 U.S. 378, 387-88 & n. 13, 101 S.Ct. 2415, 2421 & n. 13, 69 L.Ed.2d 89 (1981) , and when consumers are assured competitive price and quality. Products Liab. Ins., 682 F.2d at 663-64. Accordingly, an act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality. Cf. Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, ----, 113 S.Ct. 2578, 2588, 125 L.Ed.2d 168 (1993) (below-cost pricing is not anticompetitive in itself

because, although it causes allocative inefficiency, it brings lower aggregate prices in the market).

[12] The defendant's alleged conduct here involves predatory pricing. Predatory pricing occurs in two stages. In the first stage, or "price war" period, the defendant sets prices below its marginal cost hoping to eliminate rivals and increase its share of the market. During this phase, the predator, and any rival compelled to challenge the predatory price, will suffer losses. [FN3] Though rivals may suffer financial losses or be eliminated as a result of the below-cost pricing, injury to rivals at this stage of the predatory scheme is of no concern to the antitrust laws. Id. Only by adopting a long-run strategy is a predator able to injure consumer welfare. See Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117, 107 S.Ct. 484, 493, 93 L.Ed.2d 427 (1986) . A long-run strategy requires the predator to drive rivals from the market, or discipline them sufficiently so that they do not act as competitors normally should. Id. If the predator reaches this long-run goal, it enters the second stage, the "recoupment" period. It then can collect the fruits of the predatory scheme by charging supracompetitive prices--prices above competitive levels. The predator's hope is that the excess profits will allow it to recoup the losses suffered during the price war. Brook Group, 509 U.S. at ----, 113 S.Ct. at 2589.

In order unilaterally to raise prices above competitive levels, the predator must obtain sufficient market power. A predator has sufficient market power when, by restricting its own output, it can restrict marketwide output and, hence, increase marketwide prices. Phillip Areeda & Donald F. Turner, Antitrust Law ¶ 501, at 322 (1978) (hereinafter Areeda & Turner). Prices increase marketwide in response to the reduced output because consumers bid more in competing against one another to obtain the smaller quantity

available. Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1335 (7th Cir.1986) . Without market power to increase prices above competitive levels, and sustain them for an extended period, a predator's actions do not threaten consumer welfare. [FN4]

[13][14] Market power may be demonstrated through either of two types of proof. One type of proof is direct evidence of the injurious exercise of market power. If the plaintiff puts forth evidence of restricted output and supracompetitive prices, that is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power. See FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S.Ct. 2009, 2018-19, 90 L.Ed.2d 445 (1986) . The more common type of proof is circumstantial evidence pertaining to the structure of the market. To demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run. See Ryko Mfg. Co. v. Eden Serv., 823 F.2d 1215, 1232 (8th Cir.1987) , cert. denied, 484 U.S. 1026, 108 S.Ct. 751, 98 L.Ed.2d 763 (1988) ; Ball Memorial Hosp., 784 F.2d at 1335.

In opposing ARCO's motion for summary judgment, and in supporting its own cross motion, Rebel submitted circumstantial evidence to the district court purporting to show that ARCO possessed market power. We must determine whether this circumstantial evidence was sufficient to create a genuine triable issue with regard to market power in the Sherman Act § 2 claim.

1

[15][16][17][18] We begin with the issue of market definition. As noted above, circumstantial evidence of market power requires that the plaintiff, at the threshold, define the relevant market. A "market" is any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel, would have market power in dealing with any group of buyers. See Phillip Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 518.1b, at 534 (Supp.1993) (hereinafter Areeda & Hovenkamp). If the sales of other producers substantially constrain the price- increasing ability of the monopolist or hypothetical cartel, these other producers must be included in the market. Stated differently, a "market" is the group of sellers or producers who have the "actual or potential ability to deprive each other of significant levels of business." Thurman Indus., 875 F.2d at 1374. Market definition is crucial. Without a definition of the relevant market, it is impossible to determine market share.

[19] There are two possible definitions of the market in the present case. Rebel contends the relevant market includes all retail sales of gasoline in Las Vegas, except for sales of full-serve gasoline. This is the market in which ARCO exclusively operates. ARCO disputes Rebel's narrow market definition. ARCO contends the market is broader, consisting of all sales of retail gasoline in Las Vegas, including full-serve gasoline.

[20] The dispute between Rebel and ARCO focused on cross-elasticity of demand: whether consumers view the products as substitutes for each other. See E. Thomas Sullivan & Jeffrey L. Harrison, Understanding Antitrust and Its Economic Implications § 6.04[2] (1988) (hereinafter Sullivan & Harrison). If consumers view the products as substitutes, the products are part of the same market. Rebel's expert concluded that self-serve, cash-only gasoline and full-

serve gasoline are not substitutes. He stated that consumers of full-serve gasoline base their purchase strictly on the availability of services, for which they pay a premium. Likewise, self-serve, cash-only gasoline consumers do not consider full-serve gasoline as a substitute, he said, because they will always buy the lower cost gasoline, even if the premium for full-service is less than the cost of the service.

The district court accepted ARCO's position, concluding that both self-serve, cash-only gasoline and full-serve gasoline should be included in the relevant market. ARCO introduced affidavits from an expert who said the two products were correlated in price, indicating that the products are substitutes for each other. [FN5] The court said ARCO's affidavits were "more persuasive" than those submitted by Rebel. Rebel contends that the district court's use of the word "persuasive" indicates that the court improperly weighed the evidence, a role inappropriate at summary judgment. See Lippi v. City Bank, 955 F.2d 599, 613 (9th Cir.1992) .

[21][22][23][24][25] Rebel correctly points out that the definition of the relevant market is a factual inquiry for the jury, and the court may not weigh evidence or judge witness credibility. High Technology Careers v. San Jose Mercury News, 996 F.2d 987, 990 (9th Cir.1993) . However, that an issue is factual does not necessarily preclude summary judgment. If the moving party shows that there is an absence of evidence to support the plaintiff's case, the nonmoving party bears the burden of producing evidence sufficient to sustain a jury verdict on those issues for which it bears the burden at trial. Celotex, 477 U.S. at 324, 106 S.Ct. at 2553. If Rebel's evidence cannot sustain a jury verdict on the issue of market definition, summary judgment is appropriate. See id. at 325, 106 S.Ct. at 2553-54. This rule does not direct

courts to resolve questions of credibility or conflicting inferences. What it requires courts to do is assess whether the jury, drawing all inferences in favor of the nonmoving party, could reasonably render a verdict in favor of the nonmoving party in light of the substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52, 106 S.Ct. 2505, 2510-13, 91 L.Ed.2d 202 (1986) . The determination requires application of the standard that courts apply in motions for a directed verdict or a judgment notwithstanding the verdict. See id. at 251, 106 S.Ct. at 2511-12.

[26][27][28][29][30][31] As a preliminary matter, we note that expert opinion is admissible and may defeat summary judgment if it appears that the affiant is competent to give an expert opinion and that the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not. Bulthuis v. Rexall Corp., 789 F.2d 1315, 1317 (9th Cir.1985) . While the affidavit of Rebel's expert meets this basic standard, the inference to be drawn from expert affidavits must, as Anderson requires, be sufficient to support a favorable jury verdict. In the context of antitrust law, if there are undisputed facts about the structure of the market that render the inference economically unreasonable, the expert opinion is insufficient to support a jury verdict. Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 468-69, 112 S.Ct. 2072, 2083, 119 L.Ed.2d 265 (1992) . As the Supreme Court explained

> When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. Expert testimony is useful as a guide

> to interpreting market facts, but it is not a substitute for them. As we observed in Matsushita, "expert opinion evidence ... has little probative value in comparison with the economic factors" that may dictate a particular conclusion.

Brook Group, 509 U.S. at ----, 113 S.Ct. at 2598 (citations omitted) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 n. 19, 106 S.Ct. 1348, 1360 n. 19, 89 L.Ed.2d 538 (1986) ). The inquiry is whether the inference to be drawn from the expert's opinion is "reasonable given the substantive law which is the foundation for the claim or defense." See Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir.1987) .

[32][33] Our independent review of Rebel's expert affidavits compels the conclusion that it would be unreasonable for a juror to infer from those affidavits that full-serve sales of gasoline should be excluded from the relevant market. Rebel's expert relied on "demand elasticity"--that is, whether a price rise in self-serve, cash-only gasoline would cause self-serve consumers to shift their demand to full-serve gasoline. A price differential between two products may reflect a low cross-elasticity of demand, if the higher priced product offers additional service for which consumers are willing to pay a premium. Thurman Indus., 875 F.2d at 1376 (citing Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 715 (7th Cir.1979) (drive-thru photo processing, for which consumers paid a premium, was relevant market apart from conventional photo processing)). But defining a market on the basis of demand considerations alone is erroneous. Virtual Maintenance, Inc. v. Prime Computer, Inc., 11 F.3d 660, 664 (6th Cir.1993) (citing Areeda & Hovenkamp, ¶ 518.1, at 543), cert. dismissed, 512 U.S. 1216, 114 S.Ct.

2700, 129 L.Ed.2d 829 (1994) . A reasonable market definition must also be based on "supply elasticity." Id.; Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir.1975) . Supply elasticity measures the responsiveness of producers to price increases. Sullivan & Harrison, § 6.02 [3]. If producers of product X can readily shift their production facilities to produce product Y, then the sales of both should be included in the relevant market. Areeda & Turner ¶ 521a, at 354. The affidavit of Rebel's expert fails to account for the fact that sellers of full-serve gasoline can easily convert their full-serve pumps, at virtually no cost, into self-serve, cash-only pumps, expanding output and thus constraining any attempt by ARCO to charge supracompetitive prices for self-serve gasoline. The ease by which marketers can convert their full-serve facilities to increase their output of self-serve gasoline requires that full-serve sales be part of the relevant market; it is immaterial that consumers do not regard the products as substitutes, that a price differential exists, or that the prices are not closely correlated. Areeda & Turner ¶ 521, at 354.

[34] [35] While sellers in a normally functioning market would convert their full-serve pumps to self-serve to restrain supracompetitive pricing by ARCO, Rebel's expert contended that Las Vegas is not a normally functioning market. Rebel states: "As the market actually functions, the full-service islands simply do not represent any competition to supracompetitive pricing by ARCO." Rebel contends that ARCO's predatory below-cost pricing has so punished existing marketers of gasoline in Las Vegas that these marketers are now a "disciplined oligopoly" and have no incentive to convert their pumps to challenge ARCO's pricing. This contention is irrelevant to market definition in the present context. Rebel's theory has no bearing on the threshold question of whether those marketers are potential

competitors who should be included in the relevant market. See Thurman Indus., 875 F.2d at 1374 (a relevant market includes those sellers who have the "actual or potential ability" to compete and deprive the defendant of significant amounts of business). The fact that some marketers are oligopolists does not mean they cannot deter an attempted monopolization. Even oligopolists may compete (and the oligopoly will vanish) if one of their number strays from the pack with the intent to violate the Sherman Act. See Bork, The Antitrust Paradox 101-04 ("Nothing in the theory [of oligopoly] compels the conclusion that oligopolists do not behave as competitors."). [FN6]

Although Rebel failed to demonstrate its proposed definition of the relevant market, this is not fatal to Rebel's attempt-to-monopolize claim. In the alternative, Rebel claimed that even if full-serve gasoline is included in the relevant market, ARCO would have significant market power. The district court found that the relevant product market included full-serve gasoline. We affirm that determination and are free to address the remaining issues regarding market power. See R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 144 (9th Cir.1989) (en banc).

2

We next address the second factor in the market power analysis: market share. Measurement of market share is necessary to determine whether the defendant possesses sufficient leverage to influence marketwide output. With a dominant share of the market's productive assets, a firm may have the market power to restrict marketwide output and,

hence, increase prices, as its rivals may not have the capacity to increase their sales quickly to make up for the reduction by the dominant firm. Ball Memorial Hosp., 784 F.2d at 1335.

[36] Rebel's experts contended that ARCO possessed a 44 percent share of the retail market consisting of both self-serve, cash-only gasoline and full-serve gasoline. As a preliminary matter, ARCO disputes Rebel's claim that it possesses 44 percent of the relevant market. The dispute essentially hinges on how to define ARCO as a "firm." ARCO directly operates 15 "ARCO"-branded stations in Las Vegas; another 38 "ARCO"-branded are operated by independent dealers who purchase the gasoline at wholesale from ARCO and sell at retail on their own account. ARCO points out that if only the 15 company-owned stations are aggregated, ARCO's market share is only 11.5 percent. Rebel contends that the sales capacity of the 38 dealer stations must be included in ARCO's market share because these independent dealers are not "independent" at all. Rebel claims that ARCO conspired with Terrible Herbst, the largest dealer and owner of 23 stations, in the predatory scheme. [FN7] As for the remaining ARCO dealers, Rebel presented affidavits from past and present dealers who stated that ARCO controls their retail prices. Rebel contends that because ARCO supplies gasoline at the wholesale level to these dealers, ARCO is in a position to influence the ultimate retail price. Rebel also cited pricing data showing that "ARCO"-branded stations are tightly clustered in product price and do not appear to act as independent entities.

[37] The aggregation of market shares of several rivals is justified if the rivals are alleged to have conspired to monopolize. [FN8] Cf. United States v. American Airlines, Inc., 743 F.2d 1114, 1122 (5th Cir.1984) , cert. dismissed,

474 U.S. 1001, 106 S.Ct. 420, 88 L.Ed.2d 370 (1985) (airline's unsuccessful attempt to fix prices with rival required aggregation of both firms' shares in attempt-to-monopolize claim). For the purpose of the summary judgment motion, the district court properly aggregated all "ARCO"-branded stations together, accepting Rebel's premise that ARCO's share was 44 percent. [FN9]

In granting summary judgment to ARCO, the district court held that Rebel's evidence could not sustain a jury verdict in its favor, because a 44 percent market share was insufficient as a matter of law to give ARCO market power. The court, citing Twin City Sportservice, 512 F.2d at 1274, stated that "numerous cases" hold that any market share below 50 percent is insufficient.

[38] Rebel argues that evidence of a 44 percent market share is enough to establish a genuine issue of material fact regarding market share. It contends that the district court erred because the court relied on a "monopolization" rather than an "attempt-to-monopolize" standard. Rebel argues that when a claim involves an attempt to monopolize, the quantum of market share necessary to create a genuine issue is smaller than is required in a claim of actual monopolization.

[39][40] We agree with Rebel that the minimum showing of market share required in an attempt case is a lower quantum than the minimum showing required in an actual monopolization case. It is true, as the district court stated, that numerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power. See, e.g., Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc., 679 F.2d 516, 528 (5th Cir.1982) , cert. denied, 460 U.S. 1082, 103 S.Ct. 1770, 76 L.Ed.2d 344 (1983) ; Twin City

Sportservice, 512 F.2d at 1274. However, these cases and others cited by the district court involve claims of actual monopolization. When the claim involves attempted monopolization, most cases hold that a market share of 30 percent is presumptively insufficient to establish the power to control price. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26 n. 43, 104 S.Ct. 1551, 1566 n. 43, 80 L.Ed.2d 2 (1984) ; A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1403 (7th Cir.1989) , cert. denied, 494 U.S. 1019, 110 S.Ct. 1326, 108 L.Ed.2d 501 (1990) ; Nifty Foods Corp. v. Great Atl. & Pac. Tea Co., 614 F.2d 832, 841 (2d Cir.1980) ; M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 168 (4th Cir.1992) , cert. denied, 508 U.S. 972, 113 S.Ct. 2962, 125 L.Ed.2d 662 (1993) ; Areeda & Turner ¶ 835c, at 349. ARCO's market share of 44 percent is sufficient as a matter of law to support a finding of market power, if entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing. [FN10]

[41] We next address the final factors in market power analysis: barriers to entry and barriers to expansion. A mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme. The plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price. See Ryko Mfg., 823 F.2d at 1232.

[42][43][44] Entry barriers are "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." Los Angeles Land Co. v. Brunswick

Corp., 6 F.3d 1422, 1427-28 (9th Cir.1993) , cert. denied, 510 U.S. 1197, 114 S.Ct. 1307, 127 L.Ed.2d 658 (1994) (quoting Areeda & Hovenkamp, Antitrust Law § 409 at 509-10 (Supp.1992)). The main sources of entry barriers are: (1) legal license requirements; [FN11] (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale. Id. at 1428 n. 4. In evaluating entry barriers, we focus on their ability to constrain not "those already in the market, but ... those who would enter but are prevented from doing so." United States v. Syufy Enter., 903 F.2d 659, 672 n. 21 (9th Cir.1990) .

[45][46] To justify a finding that a defendant has the power to control prices, entry barriers must be significant--they must be capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting. See Syufy Enter., 903 F.2d at 663. Barriers to entry are insignificant when natural market forces will likely cure the problem. In such cases, judicial intervention into the market is unwarranted. For example, with easy entry, a predator charging supracompetitive prices will quickly lose market share (as well as any chance of reaping monopoly profits) as new rivals enter the market and undercut its high price. See id. at 664.

[47] Rebel introduced affidavits from experts stating that potential new competitors in the Las Vegas market face high barriers to entry, the most significant being a legal license. Since July 1, 1987, Nevada law has barred major oil refiners from entering the market and directly operating gasoline stations. Nevada Divorcement Law, 15 Nev.Rev.Stat. § 598.677. [FN12] The law contains a "grandfather" provision that permitted existing company-operated stations to remain.

At the time, ARCO owned 15 stations in Las Vegas, far more than any other major oil company. Because major oil refiners, which includes all Los Angeles refiners, are barred from entering, Rebel contended that only independent "chain" marketers or individual entrepreneurs are candidates to enter the Las Vegas retail gasoline market. Rebel claims that neither is capable of effectively competing with ARCO.

Rebel's experts contend that the unique nature and structure of the gasoline market in Las Vegas is a barrier to independent "chain" marketers who would seek to enter the market. Rebel argues there is no year-round independent source of wholesale gasoline in Las Vegas, demonstrated by the fact that 95 percent of the gasoline sold in Las Vegas arrives via the Cal-Nev pipeline. The Cal-Nev pipeline requires a minimum shipment of 420,000 gallons. Rebel's experts contend that because costs and quality maintenance limit storage of any shipment to one month, a new entrant must have the capacity to sell 420,000 gallons a month, which would require the acquisition of 10 to 15 retail outlets.

Apart from the large capital investment associated with opening and operating 10 to 15 stations, Rebel contends that both independent "chain" marketers and individual entrepreneurs would have trouble ensuring a reliable wholesale supply of gasoline at a competitive price, for two reasons. First, wholesale sellers will simply note market conditions and raise their wholesale prices, seizing the excess profits that are made available if ARCO raises its prices. Rebel's expert contends that historical data indicates that wholesale sellers have behaved in this manner. Second, since 1989, regulations in Clark County, Nevada, have required the use of oxygenated gasoline during six months each year. ARCO uses ethanol as an oxygenate, which is 3 cents per gallon cheaper than Methyl Tertiary Butyl Ether (MTBE),

the oxygenate used by every other wholesale supplier. Rebel claims this is a significant cost disadvantage to new entrants. Rebel also introduced affidavits indicating that high capital costs of $7.5 to $15 million, the unavailability of loan capital, and the "chilling" effect of ARCO's prior predatory behavior discouraged potential new competitors in the market.

[48][49] Assertions in expert affidavits do not automatically create a genuine issue of material fact. As noted above, we are obligated to look at the record to determine whether, in light of any undisputed facts, the inferences to be drawn from the expert's affidavits are reasonable. Eastman Kodak, 504 U.S. at 468-69, 112 S.Ct. at 2083. "When the expert opinion is not supported by sufficient facts to validate it in the eyes of the law or when indisputable record facts contradict or otherwise render the opinion unreasonable," summary judgment is appropriate. Brook Group, 509 U.S. at ----, 113 S.Ct. at 2598.

It is undisputed that seven independent marketers, operating a total of 17 stations, entered the Las Vegas market between 1983 and 1990, not counting attempted entrants who failed in their first year of operation. [FN13] Most of the new rivals entered before 1988. Only two rivals entered after 1988, operating one station apiece.

Undisputed evidence of entry between 1983 and 1990, the alleged predation period, might contradict an inference that ARCO engaged in predatory pricing during that period, as a firm is unlikely to enter a market when a rival is selling products below cost. But it does not necessarily contradict the threat of market power, which is the issue in this appeal. The crux of Rebel's argument is that ARCO obtained or has come close to obtaining market power since the enactment of the Divorcement Law and the oxygenate regulations in 1987

and 1988, respectively. We know of no authority that would require, as proof of market power, evidence of entry barriers throughout the period of predation. Indeed, predatory claims, including Rebel's, suggest that market power is not gained until after years of below-cost pricing, during which competitors exit the market and the defendant's market share increases. To determine whether Rebel's claim of entry barriers is reasonable, we must consider those entries occurring after 1988, when the alleged barriers were in place and when ARCO allegedly obtained the power to charge supracompetitive prices. See Cargill, 479 U.S. at 120 n. 15, 107 S.Ct. at 494 n. 15.

[50][51] The fact that entry has occurred does not necessarily preclude the existence of "significant" entry barriers. If the output or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power. See Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 838 F.2d 360, 367 (9th Cir.1988) , cert. denied, 488 U.S. 870, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988) ; Department of Justice Merger Guidelines ¶ 3.0 (1992) (entry must be "timely, likely, and sufficient in magnitude, character and scope to deter or counteract the [anti]competitive effects of concern"). Barriers may still be "significant" if the market is unable to correct itself despite the entry of small rivals. This is the position taken by Rebel's expert. He claims the new entry after 1988 was de minimis because the new rivals were "all small independent dealers with insignificant volumes, whose operations do not contradict the existence of barriers to entry in the Las Vegas market."

We addressed a similar question in Oahu, which involved an appeal from the denial of a motion for judgment

notwithstanding the verdict. In that case, we held that the entry of two rivals did not preclude the jury's finding that the defendant had actually monopolized the market. Oahu, 838 F.2d at 367. We explained that one rival's founder was a former executive for the monopolist, which supported the inference that his success in the market was not competition on the merits. As for the other rival, we noted that "evidence that the firm remained very small could reasonably preclude a decision that [the rival's] entry reflected a breakdown of barriers to entry." Id. at 367.

The same reasoning applies here. The conclusion of Rebel's expert that "significant" entry barriers were erected by the Nevada Divorcement Law and the oxygenate regulations is not contradicted or rendered unreasonable by the fact that two small rivals entered the market after the enactment of these laws. ARCO operates or supplies 53 "ARCO"-branded gas stations. A juror could reasonably conclude that two gasoline stations would have insufficient capacity to offset supracompetitive pricing by a would-be monopolist. Rebel's evidence on entry barriers is sufficient to create a genuine issue of material fact, but this does not end our inquiry.

[52][53] Market power cannot be inferred solely from the existence of entry barriers and a dominant market share. The ability to control output and prices--the essence of market power--depends largely on the ability of existing firms to quickly increase their own output in response to a contraction by the defendant. Ball Memorial Hosp., 784 F.2d at 1336. Competitors may not be able to increase output if there are barriers to expansion. One such barrier is lack of excess capacity. Excess capacity is the capacity of the rivals in a market to produce more than the market demands at a competitive price. Hovenkamp, Economics and Federal Antitrust Law § 6.10, at 182. If existing competitors are

producing at full capacity, they may lack the ability to quickly expand supply and counteract a predator's supracompetitive pricing. Id. at 1335-36. On the other hand, if rivals have idle plants and can quickly respond to any predator's attempt to raise prices above competitive levels, the predator will suffer an immediate loss of market share to competitors. In that instance, the predator does not have market power. See Herbert Hovenkamp and Avarelle Silver-Westrick, Predatory Pricing and the Ninth Circuit, 1983 Ariz.St.L.J. 4433, 466 (1983).

[54] Excess capacity is a technical concept that is difficult to measure without an analysis of a firm's costs. Instead, evidence of past output expansion may be used as a surrogate. If there is undisputed evidence indicating that competitors have expanded output in the recent past, or have the ability to expand output in the future, summary disposition may be appropriate. See International Distrib. Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786, 792 (2d Cir.) , cert. denied, 482 U.S. 915, 107 S.Ct. 3188, 96 L.Ed.2d 676 (1987) ; cf. Oahu, 838 F.2d at 366 (no market power exists in "a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors.") (emphasis added). Prior expansion by competitors would suggest that the defendant during that expansion lacked the market power to control marketwide output in the first place. See id. at 792-93. If a firm has not obtained that power and is not reasonably close to obtaining it, "it matters little that high barriers to entry exist to help that firm maintain a monopoly power it could never achieve." Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1415 (7th Cir.1989) .

On this point, Rebel's claim of attempted monopolization falters. It is undisputed that in 1988 and 1989 two firms,

Texaco and Southland, expanded their operations in Las Vegas by acquiring the assets of exiting or bankrupt rivals. Texaco acquired 14 gasoline stations from the Exxon Corporation and turned the stations into dealerships. Another 21 former "Circle K" outlets became Texaco dealerships while "Circle K" was in bankruptcy, and another 5 "Jet" stations became Texaco dealerships. In addition, the Southland Corporation added 32 more stores to its chain of "7-11" stores by acquiring the assets of "Stop N Go" markets in Las Vegas.

Rebel argues that these acquisitions do not prove "expansion" occurred, because the acquisitions involved gasoline stations already in the market. The upshot of Rebel's argument apparently is that because there is no increase in stations, Texaco and Southland dealers have no ability to increase marketwide output than they did before the acquisition. Rebel's argument ignores an important fact: gasoline stations do not produce gasoline. Stations are merely retail distribution outlets. Gasoline is produced in Los Angeles refineries, then shipped to Las Vegas via the Cal-Nev pipeline. Competitors do not have to build more gas stations to satisfy customers' wants. They can simply purchase and transport more gasoline via the pipeline. Cf. id. at 1414 (to increase output to offset, grocery stores need not build new productive assets but can deliver more groceries from suppliers). This means that, where sufficient competing retail outlets exist, a would-be monopolist must control marketwide output at the wholesale supply level in order to pose any threat of monopolizing the retail market. In essence, Rebel must show that ARCO had monopoly power, or was dangerously close to achieving it, at the wholesale supply level. See Los Angeles Land Co., 6 F.3d at 1429 n. 6 (by failing to prove that defendant controlled the supply of

bowling equipment, plaintiff failed to prove that defendant had market power in the retail bowling market).

As the expansion by Texaco and Southland suggests, the wholesale gasoline supply in Las Vegas is highly elastic, which does not support an inference that ARCO controls the supply of wholesale gasoline. Already supplying 22 dealers, Texaco undertook the task of supplying 34 more dealers in a very short time (six stations were not yet up and running). Although the volume of this increased supply is not contained in the record, it undoubtedly was substantial. Texaco's expansion occurred in 1989, about the time ARCO is supposed to have acquired market power. The expansion suggests that if ARCO attempted to curtail the total volume of gasoline sold to Las Vegas motorists, existing competitors could easily offset that action by delivering more gasoline. The expansion contradicts Rebel's position that ARCO is reasonably close to controlling the gasoline supply and retail gasoline prices. See Indiana Grocery, 864 F.2d at 1414.

Rebel's economic expert contends refiner-suppliers, such as Texaco, in reality will not deliver more gasoline to dealers if ARCO attempts to raise its price above competitive levels. Rebel explains that any retail dealers who attempt to challenge ARCO's high prices are prevented from doing so because refiner- suppliers are oligopolists who will raise their wholesale prices whenever ARCO raises its retail prices. As Rebel describes it, "retailers bear the brunt of bad times and are denied the fruits of good times."

To support his contention that refiner-suppliers are oligopolists who restrict the gasoline supply, Rebel's expert relied on pricing data showing that, in two successive periods, prices in Las Vegas were 4 to 19 cents higher than prices in Los Angeles, when adjusted for transportation costs. This is

direct proof, Rebel says, that ARCO actually exercised market power in Las Vegas in an attempt to recoup predatory losses, and that the oligopolist refiner-suppliers joined the supracompetitive pricing. Rebel's experts concluded that ARCO recouped more than $14 million, with no loss of market share.

[55] Rebel's evidence cannot, as a matter of law, be the basis for inferring market power in its attempted monopolization claim. Although oligopoly pricing cannot be ruled out as a plausible means to recoup predatory losses, Brook Group, 509 U.S. at ----, 113 S.Ct. at 2590, oligopoly pricing standing alone does not prove that ARCO has market power, at least not the degree of market power to raise the concerns of the Sherman Act. "The fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or any sinister domination," and does not violate the Sherman Act. In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litigation, 906 F.2d 432, *1443 444 (9th Cir.1990) (quoting United States v. International Harvester Co., 274 U.S. 693, 708-09, 47 S.Ct. 748, 753-54, 71 L.Ed. 1302 (1927) ), cert. denied, 500 U.S. 959, 111 S.Ct. 2274, 114 L.Ed.2d 725 (1991) . The reason for this rule is clear. To pose a threat of monopolization, one firm alone must have the power to control market output and exclude competition. Indiana Grocery, 864 F.2d at 1415. An oligopolist lacks this unilateral power. By definition, oligopolists are interdependent. An oligopolist can increase market price, but only if the others go along. Areeda & Turner, ¶ 1410b, at 64.

In Indiana Grocery, the Seventh Circuit rejected an argument similar to Rebel's. The plaintiff, Indiana Grocery, claimed that the dèfendant's predatory pricing "disciplined"

rivals to the extent that the defendant and his rivals had engaged in oligopoly pricing. The court rejected the plaintiff's argument that oligopoly pricing indicated market power, stating Indiana Grocery's theory does not implicate section 2 of the Sherman Act. At best, it poses the danger that [the defendant's] anticompetitive conduct could result in diminished price competition in an oligopolistic ... market. Section 2, however, does not govern single-firm anticompetitive conduct aimed only at creating an oligopoly.... ["]Congress authorized scrutiny of single firms only when they pose a danger of monopolization." Indiana Grocery, 864 F.2d at 1416 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S.Ct. 2731, 2740, 81 L.Ed.2d 628 (1984)) (citations omitted); cf. Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290, 291 n. 1 (2d Cir.1983), cert. denied, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984) (claim that two firms expressly colluded in an attempt to monopolize would be one of oligopoly under § 1 rather than monopoly under § 2). We recognize that a gap in the Sherman Act allows oligopolies to slip past its prohibitions, see Sullivan & Harrison, ¶ 6.07, at 262-63, but filling that gap is the concern of Congress, not the judiciary.

In summary, Rebel failed to establish a genuine issue of material fact on market power to support its attempted monopolization claim. Although there is a genuine issue regarding market share and entry barriers, there appears to be no genuine issue regarding the ability of ARCO's existing competitors to increase their output. The undisputed record indicates that the gasoline supply in Las Vegas is highly elastic and that competitors could increase their output if ARCO raised prices. Consequently, Rebel failed to produce sufficient evidence to support a finding that ARCO is dangerously close to obtaining the power to monopolize the

market. Rebel's failure to make a sufficient showing of market power demonstrates that ARCO's alleged predatory pricing has not threatened consumer welfare in a manner cognizable under § 2 of the Sherman Act. For this reason, Rebel cannot obtain damages, because any injury from ARCO's alleged below-cost pricing is not antitrust injury under Sherman Act § 2.

B

[56][57] Rebel's claim under Sherman Act § 1 alleges that ARCO conspired with Terrible Herbst, its largest dealer, to fix retail gasoline prices in Las Vegas at predatory levels. To establish a Sherman Act § 1 violation for vertical, maximum price fixing, [FN14] a private plaintiff seeking damages must demonstrate: (1) collusion to fix predatory prices, and (2) causal antitrust injury. See USA Petroleum, 495 U.S. at 335-45, 110 S.Ct. at 1889-95.

[58][59][60][61] Rebel argues that market power is not a prerequisite to antitrust injury if the claim is premised on Sherman Act § 1. It reasons that because vertical price fixing is per se illegal, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 347, 102 S.Ct. 2466, 2474-75, 73 L.Ed.2d 48 (1982) , market analysis is not necessary. Rebel confuses proof of liability with proof of antitrust injury. Per se rules relieve plaintiffs of the burden of proving anticompetitive effects, which are assumed, but they do not excuse plaintiffs from showing that their injury was caused by the anticompetitive aspects of the illegal act. Newman v. Universal Pictures, 813 F.2d 1519, 1522-23 (9th Cir.1987) , cert. denied, 486 U.S. 1059, 108 S.Ct. 2831, 100 L.Ed.2d 931 (1988) . The "mere presence" of a per se violation under

Sherman Act § 1 "does not by itself bestow on any plaintiff a private right of action for damages." Indiana Grocery, 864 F.2d at 1419. A plaintiff must prove that his injury flows from the anticompetitive aspect of the defendant's conduct. For example, in USA Petroleum, the plaintiff did not suffer antitrust injury from the defendant's conspiracy to fix low prices. Although per se illegal, maximum price fixing cannot cause antitrust injury because low prices are the "very essence of competition." Id. 457 U.S. at 338, 102 S.Ct. at 2469-70 (quoting Matsushita, 475 U.S. at 594, 106 S.Ct. at 1359-60).

[62] Unlike USA Petroleum, Rebel accuses ARCO of conspiring to fix predatory, below-cost prices. Some commentators have argued that a competitor harmed by a predator's below-cost pricing need not show market power in order to prove antitrust injury, because below-cost pricing harms consumer welfare by causing allocative inefficiency--that is, society's resources are allocated to the predated goods in amounts exceeding society's valuation of those goods. [FN15] See Roger D. Blair & Jeffrey L. Harrison, Rethinking Antitrust Injury, 42 Vand.L.Rev. 1539, 1564 (1989). The Supreme Court in Brook Group foreclosed this theory: "Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers." Brook Group, 509 U.S. at ----, 113 S.Ct. at 2588. Because below-cost pricing is a "boon to consumers," the losses inflicted on Rebel by the pricing are not the stuff of antitrust injury. It would be incongruous to award damages to plaintiffs for actions that in general benefit consumer welfare. See Indiana Grocery, 864 F.2d at 1419. To show antitrust injury under Sherman Act § 1, a plaintiff must show that the predator has market power.

Rebel does not allege that ARCO conspired with its competitors in Las Vegas to monopolize the market. Thus, for the same reasons that we stated in our analysis of Rebel's claim under Sherman Act § 2, Rebel's evidence is insufficient for a jury reasonably to conclude that ARCO possesses market power, or is dangerously close to obtaining it, under § 1. In light of this conclusion, any injury-in-fact suffered by Rebel as a result of ARCO's alleged predatory maximum price fixing does not constitute antitrust injury.

C

Rebel challenges the district court's summary judgment in favor of ARCO on its price discrimination claim. As with Rebel's other claims, the court concluded that Rebel could not prove antitrust injury, because Rebel had produced insufficient evidence that ARCO possessed market power. The issues we address are twofold: whether a showing of market power is required to demonstrate antitrust injury in a primary-line discrimination claim, and, if so, whether Rebel presented sufficient evidence of market power for a reasonable jury to decide in its favor.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, prohibits price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers *1445 of either of them." 15 U.S.C. § 13(a) (emphasis added).

[63][64] Price discrimination occurs in two forms: as a price differential between geographical markets, and as a price differential between purchasers. Price discrimination in the former sense, called primary-line injury, occurs when the seller charges predatory, below-cost prices in one market in an attempt to eliminate competitors there, and charges supracompetitive prices in another market. A competing seller in the predated market may claim injury. Price discrimination in the latter sense, called secondary-line injury, occurs when a seller grants a favorable price to one purchaser but not another. In that case, the disfavored purchaser may sue.

Rebel's claim alleged primary-line discrimination. As proof, Rebel's expert relied on pricing data showing that for four years, between 1985 and 1989, ARCO charged predatory prices in Las Vegas that, when adjusted for transportation costs, were 6 to 14 cents per gallon below those charged in Los Angeles. Rebel's expert also produced data showing that, from 1989 to 1991, ARCO intermittently charged prices in Las Vegas that were 4 to 19 cents per gallon higher than in Los Angeles. Rebel argues that this price discrimination shows that ARCO attempted to eliminate rivals and has charged supracompetitive prices to recoup its losses.

[65][66] Because primary-line injury is of the "same general character" as predatory pricing schemes actionable under Sherman Act § 2, Brook Group, 509 U.S. at ----, 113 S.Ct. at 2587, a primary-line injury plaintiff bears essentially the same substantive burden as a plaintiff under the Sherman Act. That is, to hold a defendant liable for charging below-cost prices, a primary- line plaintiff must show that the predator stands some chance of recouping his losses. Id. at ----, 113 S.Ct. at 2588. [FN16] Under the Clayton Act, as amended by the Robinson-Patman Act, the standard is a "reasonable

prospect" of recoupment. Id. This requires the plaintiff to show that the predator has market power, or that he has some reasonable prospect of obtaining it. Absent any chance of such showing, the below-cost pricing poses no threat to competition. Id.

1

[67][68][69] The parties disagree over whether Rebel must show that ARCO has market power in order to satisfy the antitrust injury requirement. Brook Group is not necessarily controlling. Brook Group addressed only the standards for liability in a primary-line claim. The standards for proving a violation differ from the standards for proving antitrust injury. Indeed, the antitrust injury requirement imposes a more stringent standard than the rules of liability. See J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 101 S.Ct. 1923, 1927, 68 L.Ed.2d 442 (1981) . Substantive liability looks to whether the defendant's conduct is forbidden; antitrust injury looks to whether the claimed injury "fall[s] squarely within the area of congressional concern." Blue Shield of Virginia v. McCready, 457 U.S. 465, 484, 102 S.Ct. 2540, 2551, 73 L.Ed.2d 149 (1982) . "Thus, to define the scope of antitrust injury for a violation of the Clayton Act, it is the purpose of that legislation, and the interests it seeks to protect, which is controlling." Greater Rockford Energy & Technology Corp. v. Shell Oil Co., 998 F.2d 391, 399 (7th Cir.1993) , cert. denied, 510 U.S. 1111, 114 S.Ct. 1054, 127 L.Ed.2d 375 (1994) . For example, because the Sherman Act's concern is consumer welfare, antitrust injury occurs only when the claimed injury flows from acts harmful to consumers.

[70] We conclude that a plaintiff alleging primary-line discrimination must prove antitrust injury in the same

manner that a Sherman Act plaintiff does--by showing that his injury flows from those aspects or effects of the conduct that are harmful to consumer welfare. Legislative history supports our conclusion. Congress first prohibited primary-line discrimination with the Clayton Act of 1914. In its original enactment, the Clayton Act forbid discrimination that might "substantially ... lessen competition or tend to create a monopoly in any line of commerce." Clayton Antitrust Act, 38 Stat. 730 (1914). The statute specifically applied only to primary-line injury. Its purpose was to prevent large corporations from invading markets of small firms and charging predatory prices for the purpose of destroying marketwide competition. See H.R. No. 627, 63rd Cong., 2d Sess. 8 (1914); Sullivan & Harrison, § 8.03, at 321. Like the Sherman Act, the original Clayton Act's primary aim was to prevent harm to consumers. See Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 855 (9th Cir.1977) (both the Sherman Act and Clayton Act are "aimed at the same economic evil"), cert. denied, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978) .

[71] In holding that a primary-line plaintiff must demonstrate an injury flowing from an aspect of the defendant's conduct injurious to consumer welfare, we intend in no way to affect the standard for antitrust injury in secondary-line cases. Secondary-line discrimination is forbidden by the Robinson-Patman Act, which amended the Clayton Act. It is clear that Congress intended the Robinson-Patman Act's provisions to apply only to secondary-line cases, not primary-line cases. See H.R. No. 2287, 74th Cong., 2d Sess. 8 (1936). [FN17] The Robinson-Patman Act stands on entirely different footing than the Sherman Act and Clayton Act. While the framers of the Sherman and Clayton Acts intended to proscribe only conduct that threatens consumer welfare, the framers of the Robinson-Patman Amendments

intended to punish perceived economic evils not necessarily threatening to consumer welfare per se. Fairness and protection of secondary-line purchasers are the concerns of the Robinson-Patman Act, a conclusion that is confirmed by the language of the statute, legislative history and judicial precedent. [FN18] Accordingly, we have held that a secondary-line plaintiff can demonstrate antitrust injury if the price discrimination caused him to lose sales and profits; he need not demonstrate any injury to consumer welfare. Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1042 (9th Cir.1987) , aff'd on other grounds, 496 U.S. 543, 557- 58, 110 S.Ct. 2535, 2543-44, 110 L.Ed.2d 492 (1990) ; accord J.F. Feeser v. Serv-A-Portion, Inc., 909 F.2d 1524, 1540 (3d Cir.1990) , cert. denied, 499 U.S. 921, 111 S.Ct. 1313, 113 L.Ed.2d 246 (1991) ; Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d *1447 1414, 1427 (11th Cir.1990) , but see Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1143 (D.C.Cir.1988) (injury to competitor may be rebutted by lack of consumer injury). As a case involving secondary-line injury, not primary-line injury, Hasbrouck is not implicated by the present case.

To prove antitrust injury, Rebel cannot rely solely on evidence that ARCO charged lower prices in Las Vegas than in Los Angeles. Lower prices, even if below cost, are the essence of competition and are a "boon to consumers." Brook Group, 509 U.S. at ----, 113 S.Ct. at 2588. To demonstrate antitrust injury in its primary-line claim, Rebel must show that ARCO has market power.

[72] The required showing of market power in a primary-line claim is somewhat less than is required in a Sherman Act claim. In contrast to the Sherman Act, which speaks only of various forms of express agreement and monopoly, the Clayton Act, as amended by the Robinson-Patman Act,

prohibits price discrimination that may lessen competition. Brook Group, at ----, 113 S.Ct. at 2591. Consequently, the Supreme Court has held that "excessive concentration, and the oligopolistic price coordination it portends, may be the injury to competition the Act prohibits." Brook Group, at ----, 113 S.Ct. at 2591 (citing United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963) ). This suggests that Rebel need only prove that ARCO has a degree of market power to threaten oligopolization, not monopolization. Despite this difference, consumer welfare is still the lodestar for determining antitrust injury in a primary-line claim. To show a lessening of competition, it is not enough to show that the number of rivals has been reduced or that the market is concentrated. Rather, it must be demonstrated that a predator has a "reasonable prospect" of enforcing oligopoly pricing in Las Vegas, and thus of recouping its predatory losses. Brook Group, 509 U.S. at ----, 113 S.Ct. at 2588.

2

[73] We now consider whether Rebel's evidence is sufficient to show antitrust injury in its price discrimination claim.

[74] In our discussion of Rebel's attempted monopolization claim, we concluded that Rebel's circumstantial evidence of market share and entry barriers in the retail market could not support a finding of market power to support an attempted monopolization claim, in light of undisputed evidence of recent expansion by Texaco and Southland, two of ARCO's existing competitors. We must evaluate that evidence again to determine whether Rebel has raised a disputed issue of material fact as to whether ARCO has the market power to "lessen competition" by enforcing an oligopoly. The degree of market power need not be as high as in a monopolization

claim. In light of this lesser standard, we conclude that Rebel has established a disputed issue of material fact as to its standing to state a cause of action under the Clayton Act.

Rebel produced data showing that, during the alleged recoupment period, ARCO's retail gasoline prices were higher in Las Vegas than in Los Angeles, when adjusted for transportation costs. Rebel's experts opined that this is direct evidence of supracompetitive pricing by ARCO, as Los Angeles is a highly competitive retail gasoline market. Further, Rebel produced evidence that ARCO's market share actually increased during the period when it was charging allegedly supracompetitive prices. Rebel contends that this evidence indicates that ARCO's existing competitors in the retail gasoline market have been "disciplined" by ARCO's pattern of below-cost predatory pricing, and are unwilling to risk price competition with ARCO. Rebel argues that this is evidence that ARCO has achieved the market power to enforce a classic disciplined oligopoly, one of the anticompetitive effects that the Clayton Act prohibits. See Brook Group, 509 U.S. at ----, 113 S.Ct. at 2591.

As we noted above, Rebel has produced evidence of significant barriers to entry in the Las Vegas retail gasoline market. This is crucial, because if entry is unimpeded, supracompetitive profit levels in the market would attract new competitors to the market, who could undercut ARCO's prices and prevent it from recouping its predatory losses. *1448 See Brook Group, at ----, 113 S.Ct. at 2589. We have already determined that Rebel's evidence indicates that these barriers to entry are significant, and thus that new competitors are unlikely to enter the market at price and volume levels sufficient to challenge ARCO.

[75] Rebel may rely on this evidence of oligopoly pricing to prove market power on its price discrimination claim. Although such evidence cannot support a claim of monopolization under the Sherman Act, no such limitation exists when the claim involves price discrimination under the Clayton Act. Brook Group, 509 U.S. at ----, 113 S.Ct. at 2591. Further, the lack of evidence of output restriction is not so significant here. The economic forces at work in an oligopoly are very different than in a monopoly. A predator is able to establish and maintain supracompetitive prices in an oligopoly by making it too painful for its existing competitors to challenge its prices, and thus, "disciplining" them. This distinction between oligopolistic and monopolistic practices is crucial to the survival of Rebel's price discrimination claim. Read in the most favorable light, Rebel's evidence tends to indicate that no new competition can enter the market to challenge ARCO, and that the existing competition, while it may be able to challenge ARCO, lacks the will to do so.

We conclude that Rebel has produced sufficient evidence to create a disputed issue of material fact as to whether ARCO has sufficient market power to maintain oligopoly pricing. Summary judgment on Rebel's price discrimination claim was therefore improper; Rebel may be able to demonstrate antitrust injury on this claim. [FN19]

III

Rebel has failed to provide sufficient evidence to support a jury verdict on the issue of ARCO's "market power" under the Sherman Act. As a result, Rebel cannot establish a genuine issue of fact regarding antitrust injury on its Sherman Act § 1 and § 2 claims, and the district court properly granted summary judgment for ARCO on those claims.

Rebel's evidence is sufficient, however, to raise a disputed question of material fact as to whether ARCO achieved sufficient market power to enforce supracompetitive oligopoly pricing. [FN20] This showing is sufficient to allow Rebel to survive summary judgment on the issue of antitrust injury resulting from price discrimination under the Clayton Act.

The judgment of the district court is AFFIRMED in part and REVERSED in part. We REMAND to the district court for further proceedings consistent with this opinion.

Footnotes

FN1. Marginal cost is the cost that a firm incurs in the production of one additional unit of output. Herbert Hovenkamp, Economics and Federal Antitrust Law 10 (1985). Rebel measured ARCO's marginal cost based upon an agreement that ARCO signed with Tosco Corp. to purchase incremental supplies of gasoline. Rebel claims that ARCO bought the additional supplies of gasoline from Tosco because it was expanding output but was unable to obtain the additional output from its own refineries. The cost of this "last barrel" of gasoline represents ARCO's marginal cost for gasoline.

FN2. Sherman Act § 2 states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize ... trade shall be guilty" of an antitrust violation. 15 U.S.C. § 2 (1994).

FN3. "Losses during a price war will be proportionally higher for the predator because he faces the necessity of expanding his output at ever higher costs, while the victim not only will not expand output but has the option of reducing it and so

decreasing his costs." Robert H. Bork, The Antitrust Paradox 148 (1979).

FN4. Social welfare is maximized when the price of a good equals its marginal cost--the cost of producing the last unit of output. When a firm with market power cuts output to increase prices, price exceeds marginal cost. This causes a loss to society of all that additional output which the firm could produce by lowering its price to marginal cost. Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 857 n. 9 (9th Cir.1977) , cert. denied, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978) .

FN5. The price-correlation data purportedly showed that the prices of self-serve, cash-only gasoline and full-serve gasoline tend to move together, i.e., when one goes up, the other goes up, and vice versa. The expert noted that under the "Stigler" method of proving supply elasticity, high price correlation indicates that consumers view the products as substitutes for each other. See George J. Stigler & Robert A. Sherwin, The Extent of the Market, 28 J.L. & Econ. 555, 572-73 (1985). Self-serve sellers could not increase price and still expect to serve the same number of customers (and, hence, sell the same quantity of gasoline) as they did at the lower price.

FN6. If we accepted Rebel's argument, we would be assuming the existence of ARCO's market power before defining the relevant market, a method of analysis that defies logic. Moreover, the purpose of defining the relevant market in an attempt-to-monopolize claim is to determine whether ARCO has sufficient market power to pose a threat of monopoly. The fact that the market is an oligopoly is of no concern, as an oligopoly is not per se illegal under Sherman Act § 2. See Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1415-16 (7th Cir.1989) .

FN7. As proof of conspiracy, Rebel submitted an article in a trade publication in which Ed Herbst, vice president of the family-owned business, was quoted as saying: "ARCO opened stores in Las Vegas and was selling 5 to 7 cents a gallon below what we paid wholesale. My dad said, 'If you can't beat them, join them.' So we joined them."

FN8. To prove a conspiracy to monopolize, Rebel must show that the independent dealers had the specific intent to conspire to monopolize; it is not enough to show that the dealers merely agreed to go along with ARCO's pricing. See Belfiore v. New York Times Co., 826 F.2d 177, 183 (2d Cir.1987) , cert. denied, 484 U.S. 1067, 108 S.Ct. 1030, 98 L.Ed.2d 994 (1988) .

FN9. While the issue of collusion is a matter disputed by ARCO, the district court limited discovery strictly to the issue of market power. No discovery was allowed on collusion. Given that fact, all inferences on the issue of collusion must be drawn in Rebel's favor to properly determine the summary judgment motion. See Fludd v. United States Secret Serv., 771 F.2d 549, 554 (D.C.Cir.1985) (per curiam).

FN10. The Fourth Circuit has stated that claims involving shares between 30 and 50 percent "should usually be rejected, except when conduct is very likely to achieve monopoly or when conduct is invidious, but not so much so as to make the defendant per se liable." M & M Medical Supplies, 981 F.2d at 168 (citing Areeda & Turner ¶ 835c, at 350). This standard, initially proposed by Professors Areeda and Turner, would include predatory conduct in the "invidious" category. In addition, a separate standard would presume market power if the market share is greater than 50

percent, if the other substantive elements of an attempt to monopolize claim are satisfied. Id. at 168.
We are reluctant to apply such bright-line rules regarding market share in deciding whether a defendant has market power to restrict output or raise prices. Courts should be "wary of the numbers game of market percentage" when considering attempt-to-monopolize claims. Dimmitt Agri Industries, 679 F.2d at 533. As Professors Areeda and Turner admit, their refined rules may be "illusory" guides to deciding market power. Areeda & Turner ¶ 835c, at 350. The far wiser approach, which this circuit has observed if not explicitly adopted, is illustrated by Ball Memorial Hosp., 784 F.2d at 1335 (7th Cir.) and Ryko Mfg., 823 F.2d at 1232 (8th Cir.) , where the issue of market power was decided by carefully analyzing certain telltale factors in the relevant market: market share, entry barriers and the capacity of existing competitors to expand output. We see no reason to depart from this mode of analysis.

FN11. "It is well known that some of the most insuperable barriers in the great race of competition are the result of government regulation." United States v. Syufy Enterprises, 903 F.2d 659, 673 (9th Cir.1990) .

FN12. A refiner is barred if it meets three conditions: (1) produced more than 30 percent of the domestic and imported crude oil supplied to its refinery; (2) refines gasoline from crude oil; and (3) has a total refinery capacity of more than 175,000. 15 Nev.Rev.Stat. § 597.340.

FN13. According to Rebel's own expert, these marketers included Domino's, Desert Bait, Green Valley, King 8 and Express.

FN14. Section 1 states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared to be illegal." 15 U.S.C. § 1 (1994).

FN15. To put it another way, pricing below marginal cost is socially wasteful because the seller produces goods at a cost which is greater than their value to consumers. Janich Bros., 570 F.2d at 857-58; Hovenkamp, Economics and Federal Antitrust Law, at 46.
As we have noted previously, allocative efficiency is synonymous with consumer welfare, Chesapeake and Ohio R.R. Co. v. United States, 704 F.2d 373, 376 (7th Cir.1983) , and is the central goal of the Sherman Act. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958) (the Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources.")

FN16. The Supreme Court implicitly overruled Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967) , a controversial case which set forth different standards for primary-line injury. The court explained that Utah Pie was merely an "early judicial inquiry." Brook Group, 509 U.S. at ----, 113 S.Ct. at 2587.

FN17. The Robinson-Patman Act "attaches to competitive relations between a given seller and his several customers. It concerns discrimination between customers of the same seller. It has nothing to do with ... requir[ing] the maintenance of any relationship in prices charged by a competing seller." H.R. Report No. 2287, 74th Cong., 2d Sess. 8 (1936).

FN18. Enacted in 1936, the Robinson-Patman Act amendments were an outgrowth of dissatisfaction with the original Clayton Act's inability to prevent large retail chains from obtaining "quantity discounts" from big suppliers, at the disadvantage of small retailers who competed with the chains. H.R. Report No. 2287, 74th Cong., 2d Sess. 3-4 (1936); S.Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936); FTC v. Morton Salt Co., 334 U.S. 37, 43, 68 S.Ct. 822, 826-27, 92 L.Ed. 1196 (1948) .

The new law broadened the scope of the Clayton Act's provisions. While the Clayton Act only proscribed conduct that may "substantially lessen competition or tend to create a monopoly[,]" the new law added the following crucial passage: "or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." The purpose of this passage was to relieve secondary-line plaintiffs--small retailers who are disfavored by discriminating suppliers--from having to prove harm to competition marketwide, allowing them instead to impose liability simply by proving effects to individual competitors. H.R. Report No. 2287, 74th Cong., 2d Sess. 8 (1936). As the House Report stated:

> The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination.

The Senate Report stated that the amendments aimed to prevent competitor injury as a means of preventing general market injury--"to catch the weed in the seed will keep it from coming to flower." S.Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936). As the Supreme Court long ago stated:

"Congress intended to protect a merchant from competitive injury attributable to discriminatory prices ..." Morton Salt Co., 334 U.S. at 49, 68 S.Ct. at 829-30; Greater Rockford Energy, 998 F.2d at 399-400 n. 11.

FN19. ARCO argues that Rebel's continued presence in the Las Vegas Market undercuts Rebel's claim of antitrust injury. ARCO contends that, while oligopoly pricing hurts consumer welfare, Rebel, as a competitor in the market, stood to benefit from any oligopoly pricing. See Matsushita, 475 U.S. at 574, 106 S.Ct. at 1348. It is undisputed that during the peak of the alleged oligopoly pricing, when the cost of a gallon of gasoline was more than 19 cents higher in Las Vegas than in Los Angeles, Rebel's prices were within a penny of ARCO's prices. Rebel may have received gains during this period offsetting some of the lost profits it suffered during the period of ARCO's alleged below-cost pricing. Even if this is true, however, the argument goes to the measure of damages, rather than the existence of antitrust injury. If Rebel is ultimately able to prove injury resulting from anticompetitive conduct on the part of ARCO, it should not be precluded from recovery simply because it was not driven completely from the market.

FN20. We, of course, express no opinion on the ultimate merits of the claim. At trial, Rebel may fail to establish a "reasonable prospect" of recoupment by ARCO, or ARCO may be able to prove facts sufficient to establish a defense to Rebel's claim.

## ¶740. Average Variable Cost as Surrogate

740a. Introduction; short-mn marginal cost generally, but not always, difficult to measure. The preceding Paragraph showed that in the majority of cases the division between predatory and non-predatory prices is best measured by short-run marginal cost. For these purposes, marginal cost consists of the added direct cost of producing an additional unit plus an amount equal to includable per unit use depreciation.

Unfortunately, marginal cost is extremely difficult to measure. To be sure, there are numerous exceptional cases in .which, although we cannot measure marginal cost itself, we can readily conclude that the price at issue is either well above or well below marginal cost. As an example of the price well above marginal cost, consider the single-product plant whose prices are clearly above average variable cost and who clearly has excess capacity. Since under excess capacity average variable cost is above marginal cost,' it follows that a price above average variable cost is above marginal cost as well.[2]

As an example of a price clearly below marginal cost, consider firm whose price is below its direct out-of-pocket expenses for inventory or ingredients. For example, a gasoline retailer might pump gasoline at less than the price it pays wholesale. Or a baker might charge less for bread than it pays for the flour, salt, and yeast used in baking it. Or the cigarette manufacturer might sell its product at less than the price it pays for the incorporated tobacco and paper. In the Ninth Circuit's *Rebel Oil* case the plaintiff alleged that the defendant was unable to supply gasoline at the predatory price from its own refineries, so it contracted to purchase more from an independent supplier, and paid more than it charged upon resale.[3] If so, the resulting price was clearly below marginal cost. Further, as the court noted, that would be true of *all* sales made at that price, not only for the sales of the gasoline bought at a high price. "Marginal" cost does not look at the average cost, but the incremental cost of the last unit produced, which in this case was the higher cost units procured from the independent supplier. [4]

Suppose, for example, that a firm refined 1000 gallons per day of its own gasoline, which has variable costs of $1 and which normally sells at a price of $1.10. Because this volume exhausts the firm's refining capacity, it then supports predation by purchasing additional gasoline at $1.06, and selling all its gasoline at a price of $1.03. In this case we have evidence of prices below marginal cost, even though they might be above average variable cost.[5] The *incremental* gasoline costs $1.06, which is greater than the price of $1.03. Under the marginal cost test it does not matter that the firm's self-refined gasoline continues to have average variable costs less than the price; what matters is that the firm has increased output and cut price into a range in which incremental costs are greater than incremental revenue.[6]

In the broader run of cases, however, we will be unable to locate the relationship between price and short-run marginal cost. For these cases we propose that average variable cost be used as a surrogate for marginal cost. Average variable cost consists of all costs properly classified as variable, including use depreciation, divided by relevant output.

Average variable cost is not identical with marginal cost. Where variable costs are declining, average variable cost is higher than marginal cost; where variable costs are rising, average van-able cost is below marginal cost. However, if variable costs are constant in the relevant range, then in that range average variable cost and marginal cost are equal.[7] By reference to the marginal cost standard, accordingly, reliance on average variable cost to prove predation may be identical, more prohibitive, or more permissive, depending on whether the plant in question was producing with excess capacity, at optimal capacity, or beyond optimal capacity.[8]

These differences lead to the question whether average variable cost is a suitable test for distinguishing between predatory and non-predatory pricing wherever business accounts are capable of showing average variable cost but not marginal cost. Numerous decisions have concluded, at least presumptively, that average variable cost is at least the

presumptive baseline for determining predation,[9] although they often accompany these statements by adding other refinements or presumptions that can lead to a different result.[10]

An average variable cost rule, like a marginal-cost rule, should be flexible enough to allow a defendant to demonstrate that its price was equal to or above a reasonably anticipated average variable cost. A firm may legitimately determine its price and output levels according to expected future costs rather than historical accounting costs. Of course historical costs may be the best approximation of costs for the near future, but a defendant should be permitted to show why it anticipated lower costs in the future.

There is no a priori reason to expect any particular firm to be operating at the point where marginal cost equals average variable cost,11 but when the two cost measures are identical over the relevant range of output, employing one as a proxy for the other plainly raises no difficulties.

Footnotes

1 ¶740. n.1. See ¶b and the illustration in note 8 below.

2. As ¶b notes, however, in this output range we would consider average variable cost as correct in principle, and not merely as a surrogate for marginal cost.

3. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir.), cert. denied, 116 5. Ct. 515 (1995).

4. See 51 F.3d at 1431 & n.1.

5. If the volume of self-refined gas costing $1 is large, while the volume of purchased gasoline costing $1.06 is small, then the $1.03 price might still be above average variable cost.

6. The hypothetical case is also an illustration of marginal cost higher than average variable cost under conditions where output is too large in relation to capacity.

7. A moment's reflection on the concept of "marginal" and "average" variable costs should bear this out. Suppose that as Supreme Court Justices walk into the room they are weighed, and one law clerk writes down the weight of each Justice as he or she appears, while the second computes and writes down the average weight of all the Justices in the room. Currently four Justices are in the room, with an average weight of 200 pounds. Now suppose the fifth Justice comes in and weighs 220 pounds. He will increase the average to 204 pounds, thus pulling it up. Alternatively, suppose the fifth Justice comes in and weighs 120 pounds. She will decrease the average to 184, thus pulling it down. Or, alternatively, if the next Justice weighs precisely 200 pounds, the average will remain unchanged. In sum, if the new, or "marginal" Supreme Court Justice weighs more than the average, the average will increase; if the marginal Supreme Court Justice weighs less than the average, the average will decrease; if the marginal Supreme Court Justice weighs precisely the average, then the average remains unchanged. As long as the average weight remains constant at 200 pounds as new Justices walk into the room, it follows that the rate of each individual, or marginal one must also be 200 pounds.

8. Figure 1 illustrates, showing a market demand situation in which both profitability and predation are possible (demand curve D), and a much weaker market demand situation in which the firm cannot be profitable (demand curve $D_e$). When the plant is producing under severe excess capacity, at output level Qe, average variable cost is above marginal cost and accordingly the plaintiff can "prove" predation somewhat more easily. When the plant is producing at Qc, which is the

competitive rate of output and in the plant's optimal range, average variable cost and marginal cost are quite close, with marginal cost a little higher, since the price is actually covering average total costs. When the plant is producing at a pred-atory level, Qp, output is so high in relation to capacity that the plant is no longer minimizing its costs. Then average variable cost is significantly below marginal cost and predation becomes rather difficult to prove.

9. E.g., *International Travel Arrangers v. NWA (Northwest Airlines)*, 991 F.2d 1389 1396 (8th Cir.), cert. denied, 114 5. Ct. 345 (1993); *Morgan v. Ponder*, 892 F.2d 1355, 1360 (8th Cir. 1989); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983); *Northeastern Tel. Co. v. AT&T*; 651 F.2d 76, 87-88 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982); *Broadway Delivery Corp. v. United Parcel Serv.*, 651 F.2d 122 (2d Cir.), cert. denied, 454 U.S. 968 (1981); *General Foods*, 103 F.T.C. 204 (1984).

10. See ¶723d (rev. ed.).

15 U.S.C.§ 13. Discrimination in price, services, or facilities

(a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods,

wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.